Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

MARITIMA MEXICANAS SA DE CV,
also known as, MarMex,

Petitioner,

v.

PERFORACIONES EXPLORACION Y PRODUCCION,
also known as, Protexa; CERTAIN REINSURING
UNDERWRITERS, Subscribing to Reinsurance Contract
No. AHE-030044 as Amended to No. AHE-04004,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 14, 2010

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QUESTIONS PRESENTED FOR REVIEW

I. The Fifth Circuit Has Expanded Admiralty Subject Matter Jurisdiction of the Federal Courts Worldwide to Collisions Between Foreign Vessels in Foreign Waters That Involve No Discernible Interests of the United States or its Citizens, Beyond the Grant of the United States Constitution or Any Precedent of this Court.

II. Alternatively, the Fifth Circuit Has Misapplied the Doctrine of Forum non Conveniens to Permit a Case with No Connection to the United States to Be Tried in a United States District Court, and Has Departed So Far from the Accepted Course of Resolving Forum non Conveniens Cases, That Supervisory Authority Should Be Granted by this Court.

PARTIES TO THE PROCEEDING

1. Maritimas Mexicananas, S.A. de C.V. a/k/a MarMex

2. Perforaciones Exploracion Y Produccion, a/k/a Protexa

3. Grupo TMM, S.A. de C.V.

4. Navigators Insurance Services of Texas, Inc.

5. Commonwealth Insurance Company

6. New York Marine & General Insurance Company

7. ARCH Insurance Group

8. St. Paul Fire and Marine Insurance Company

9. Hannover Re

10. Axis Re Limited

11. ACE INA UK Limited

12. Compagnie de Reassurance d'Ile France

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 14.1(b) and 29.6, and to enable justices of the Court to evaluate possible disqualification or recusal, petitioner — Maritima Mexicanas, S.A. de C.V., certifies that the following are all of the corporate parents and other publicly held companies owning 10% or more of the petitioner's stock at the time of the allision in question:

Seacor Maritima Mexico, Inc.

Transportes Maritimas Mexico, S.A. de C.V.

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Order of the Fifth Circuit Denying Petition for Rehearing en banc issued February 17, 2010 in Case No. 08-41021. Opinion of the Fifth Circuit on Appeal from the United States District Court for the Southern District of Texas, USDC No. 05-cv-419, issued December 9, 2009 in Case No. 08-41021.

Findings of Fact and Conclusions of Law in the United States District Court for the Southern District of Texas, issued September 2, 2008 in Case No. 05-cv-419. DN 297; 2S 5513-5529[1].

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Order on Defendants' Motions to Dismiss in the United States District Court for the Southern District of Texas, issued July 21, 2006 in Case No. 05-cv-419. DN 67; OV 2010-2027.

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STATEMENT OF THE BASIS FOR JURISDICTION

Jurisdiction of the underlying action and the appeal to the Fifth Circuit was premised upon 28 U.S.C. § 1333 and Fed. R. Civ. P. 9(h), since this is a claim for damages arising from a maritime collision between two vessels. Defendant MarMex appealed to the Fifth Circuit on October 1, 2008 from a final interlocutory judgment finding liability by the district court, pursuant to both 28 U.S.C. § 1292(b) and 28 U.S.C. § 1292(a)(3). The Fifth Circuit accepted the appeal pursuant to the latter statute as an appeal from an interlocutory order determining the rights and liabilities of the parties to admiralty cases.

The three judge panel of the Fifth Circuit entered a judgment affirming the decision of the trial court on December 9, 2009. Thereafter, on December 22, 2009, a Petition for Rehearing En Banc was filed with the Fifth Circuit, within the fifteen day timeframe for seeking such relief. The original panel, observing that no en banc polling had been requested, issued a ruling on February 17, 2010 denying the petition for rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 to consider petitions for certiorari from final judgments of courts of appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. 3, § 2

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution,

> the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--*to all cases of admiralty and maritime jurisdiction;*--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATEMENT OF THE CASE

Facts

On March 31, 2004, the M/V ISLA AZTECA, a Mexican-flagged supply vessel, collided with another Mexican-flagged vessel, the Mobile Operating Drilling Unit ("MODU") TOTONACA in Mexico's Bay of Campeche, an area indisputably within Mexico's Exclusive Economic Zone.[2] Petitioner, Maritimas Mexicanas, S.A. de C.V. ("MarMex") owned and operated the ISLA AZTECA. Respondent Perforaciones Maritimas Mexicanas ("Protexa") owned the TOTONACA, a jack up rig which was on station and jacked down when the allision occurred.[3] Both MarMex and Protexa are and were incorporated solely in Mexico, with headquarters, offices, and business

[2] 2S 5519; App. 29a.

[3] 2S 5519; App. 29a.

operations in Mexico.[4] At the time of the collision, the crews of both vessels were Mexican nationals.[5] The contract under which the TOTONACA was being used to drill for oil was between Protexa and PEMEX (the Mexican national oil company). MarMex was working under a separate contract with PEMEX.[6] Both of these contracts with PEMEX contained Mexican choice of law and forum selection clauses.[7] Following the allision, both the ISLA AZTECA and the TOTONACA were repaired in Mexico.[8]

On May 6, 2004, MarMex filed a petition to limit its liability in Mexico, as it was entitled to do under the law of its country. The Limitation Action remains pending and funded in Mexico, thereby providing Protexa with an adequate forum to seek redress of its claims arising from the collision, by filing a claim in the action pending in its own country. On May 17, 2004, Protexa also availed itself of Mexican jurisdiction by filing a Querella against MarMex, in order to obtain monetary damages in excess of the Limitation fund if it succeeded.[9]

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[4] 2S 5513; App. 19a.

[5] 1S 1325.

[6] 1S 4285, at 13-19; App. 137a.

[7] 1S 1605, 1S 4285 at 13-19; App. 138a.

[8] 1S 2614-18

[9] 1S 2703; App 57a.

Procedural History in United States

On July 28, 2005, Perforaciones Exploracion y Produccion ("PEP")sued MarMex, Seacor Holding, Inc. and Grupo TMM, S.A. de C.V. ("TMM") in the United States District Court for the Southern District of Texas, Galveston Division, Judge Samuel Kent presiding. Seacor, an American corporation, was sued on the basis that it owned 40% of MarMex. This allegation was in fact shown to be incorrect, and led to Seacor being dismissed from the action. On July 14, 2006, after it was clear that PEP had no ownership or proprietary interest in the TOTONACA, the district court permitted a substitution of parties so that PMM ("Protexa") would become the party plaintiff, to avoid dismissal on the basis of *Robins Dry Dock*.[10] That same month, Seacor was dismissed from the case, leaving the two Mexican entities, MarMex and Grupo TMM (the parent company of MarMex), as the remaining defendants.

On July 21, 2006, Judge Kent denied the Motion to Dismiss for lack of subject matter jurisdiction, *forum non conveniens*, and principles of international comity filed by MarMex and Grupo TMM.[11] The two defendants filed an interlocutory appeal of that ruling to the Fifth Circuit, which appeal was dismissed in November, 2006, on a finding by the Court of Appeal that the order appealed from did not determine the

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[10] *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); OV 1866; App. 90a; OV 2084, at 3-2090, at 13; App. 126a-133a.

[11] OV 2026; App. 88a.

parties' substantive rights and liabilities, and was therefore, premature.[12]

In May, 2007, Judge Kent ordered that Mexican law should be applied to the case and that Article 1913 of the Mexican Civil Code[13] was applicable as Mexican substantive law, but that the Limitation Statute of Mexico[14] was not substantive and therefore would not be applied.[15]

In October, 2007, the case was reassigned to Judge Ellison in the Southern District of Texas, Houston Division.[16] MarMex and TMM filed motions to reconsider the motion to dismiss as well as the refusal to apply the Mexican Limitation Statute.[17] Judge Ellison declined to reconsider the *forum non conveniens* and international comity issues, but stated that "Given the facts of this case, this Court likely

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[12] *Perforaciones Exploracion y Produccion v. Grupo TMM, S.A. de C.V.*, 207 Fed. App'x 458 (5th Cir.); 1S 407; App. 92a and 96a-97a.

[13] Codigo Civil Federal [C.C.F.] [Federal Civil Code], Articulo 1913 (Mex.) Article 1913 of the Mexican Civil Code.

[14] Codigo Civil Federal [C.C.F.] [Federal Civil Code], Convenio Sobre Limitacion de la Responsibilidad Nacida de Reclamaciones de Derecho Maritimo, 1976 (Mex.) - Limitation Statute of Mexico.

[15] 1S 718-19; App. 116a.

[16] 1S 24; App. 135a.

[17] 1S 1324-1659; 1S 2652-64; 1S 2670-73; 1S 2699-2701; 1S 3177-3201; 1S 3221-25; 1S 1319-23; 1S 2112-17; 1S 2821-91; 1S 3131-54; 1S 3155-69; 1S 3170-76.

would have reached a different conclusion if it had been considering Defendant's motion to dismiss eighteen months ago."[18] With respect to the issue of subject matter jurisdiction, Judge Ellison stated "The Court is not aware of a case that addresses the precise fact scenario present in this case; namely, an *in personam* involving an allision between two vessels operating under the flag of the same country that occurred in the country's Exclusive Economic Zone. In the absence of clearly controlling precedent to the contrary, however, the Court cannot find that the decision to deny Defendants' motion to dismiss constituted a manifest error of law."[19]

In April, 2008, Judge Ellison bifurcated the trial of liability and damages, noting that "Among other things, bifurcation will allow the Fifth Circuit to decide with finality any questions regarding the exercise of jurisdiction over Defendants and the Court's interpretation and application of Mexican law."[20] After some stipulations with respect to the cause of the allision, on May 5-6, 2008, the case proceeded to trial on two issues: (1) whether TMM was a "user" of the ISLA AZTECA who could be held liable pursuant to Article 1913 of the Mexican Civil Code and (2) whether damage to the TOTONACA's spud cans was causally related to the allision.[21] The trial court

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[18] 1S 2709; App. 65a.

[19] 1S 2708-2709; App. 65a.

[20] 1S 3301-3302; App 118a-119a

[21] 2S 5514; App. 20a.

found that TMM was not a user, and, a take-nothing judgment was rendered in its favor. It also found that the damage to the TOTONACA's spud cans was not causally related to the allision.[22] No trial on damages has been set.

On October 1, 2008, MarMex filed an appeal pursuant to 28 U.S.C. § 1292(a)(3) on the following issues: 1) the absence of subject matter jurisdiction; 2) the abuse of discretion by the District Court in failing to dismiss the case based on *forum non conveniens*; 3) the abuse of discretion in failing to dismiss the case based on principles of international comity; and 4) the District Court's legal error in treating the Mexican Limitation Statute as procedural instead of substantive.

On December 9, 2009, a three judge panel of the United States Fifth Circuit Court of Appeals issued a per curiam ruling affirming the rulings of the District Court on the Motion to Dismiss and the ruling that the Mexican Limitation Statute was procedural. MarMex filed a Petition for Rehearing En Banc on December 22, 2009. On February 17, 2010, the original three-judge panel issued another per curiam ruling, denying the petition for rehearing.

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[22] 2S 5528-29; App. 52a-54a.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Has Expanded Admiralty Subject Matter Jurisdiction of the Federal Courts Worldwide to Collisions Between Foreign Vessels in Foreign Waters that Involve No Discernible Interests of the United States or its Citizens, Beyond The Grant of the United States Constitution or Any Precedent of This Court.

The facts of this case present an opportunity for this Court to draw a bright line as to the scope of subject matter jurisdiction in admiralty and maritime cases. While that line, as both district judges noted, has not always been well defined, it has never been extended by this Court or any other circuit to this extreme. Simply, the decision of the Fifth Circuit breaks new ground in an area where national uniformity is paramount. If a court is going to opine, as the Fifth Circuit has now done, that the constitutional grant of subject matter jurisdiction over admiralty cases extends to collisions in foreign waters, between foreign vessels owned by foreign entities, with no identifiable United States interest, that court should be the Supreme Court of the United States. This is particularly true where there has been no recent expression by this Court and the Fifth Circuit has relied upon an 1885 decision of this Court and a handful of its own decisions, all of which are distinguishable, and all of which depend upon facts where a United States interest is identified.

The issue of subject matter jurisdiction over foreign maritime controversies implicates not only issues of the extent of sovereign interests, but the policy reasons for why the sovereign power should be so extended or

limited. If the constitutional grant of admiralty and maritime subject matter jurisdiction is unlimited, then the *only* restraint on foreign entities flocking to United States courts for the resolution of purely foreign controversies will be the doctrine of *forum non conveniens*. As will be shown in the second part of the argument below, this doctrine is a far from adequate gatekeeper, particularly when its criteria are not applied properly by individual district courts and the standard of review dissuades courts of appeal from correcting results which are in all respects flawed.

It is submitted that the acknowledgement of some limits or parameters on the admiralty subject matter jurisdiction of the federal courts, besides simply the fact that the cause arose on navigable water or bore a relationship to traditional maritime activity, is consistent with notions of national sovereignty and the defined interests of the United States, for which that original grant of jurisdiction was posited in the first place.

The basis for subject matter jurisdiction over admiralty and maritime claims is found initially in Article 3, Section 2 of the Constitution. There, the judicial power is extended to "all cases of admiralty and maritime jurisdiction." In determining the boundaries of admiralty jurisdiction, this Court has historically "looked to the purposes of the grant."[23] That fundamental purpose or interest has been defined

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[23] *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991), *citing, Ins. Co. v. Dunham*, 78 U.S. (1871).

by this Court as "the protection of maritime commerce."[24]

It begs the question how the extension of admiralty jurisdiction to the waters of foreign countries protects maritime commerce, either in the United States or in the foreign country, when no discernible United States interest or interest of its citizens is involved, and the only result is to make rulings of a local nature of citizens of that foreign, sovereign nation, applying the local maritime laws of that nation. No international interest is being served. Rather, it is simply an act of a larger nation imposing its hegemony upon the smaller nation under the pretext of some larger, international interest which palpably does not exist.

This court has noted in the past that:

> Subject matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject matter delineations must be policed by the courts on their own initiative even at the highest level.[25]

The question posed herein is whether or not any subject matter limitations exist upon admiralty jurisdiction. The facts of this case present a circumstance where no identifiable United States

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[24] *Sisson v Ruby*, 497 U.S. 358, 367 (1990), *quoting Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982).

[25] *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999).

interests exist, either in the form of the parties involved or in the existence of more abstract United States policy interests. The collision between two Mexican-flagged vessels, owned and operated by entirely Mexican corporations, in Mexican waters, crewed by Mexican nationals, while both vessels were working under contract for the Mexican national oil company, is an event entirely free from U.S. involvement. The litigants are not U.S. corporations. The applicable law will be the law of the Republic of Mexico, over which the United States court has no overriding interest. The fact pattern is so devoid of any United States relationship that District Judge Ellison frankly admitted that he could find no case law support for extending the jurisdiction of the American courts to such a cause.

The Fifth Circuit, by contrast, assumed the existence of jurisdiction worldwide, so long as the case involved a maritime locality. This global reach of subject matter jurisdiction was found, not in the existing case law, but in a treatise.[26] Specifically, the Fifth Circuit held that the subject matter jurisdiction in admiralty cases "potentially extends to the four corners of the globe, to the high seas and even foreign territorial waters."[27] While in certain instances this may be correct, insofar as there is an identifiable interest of the United States which justifies such an extension, the Fifth Circuit goes farther and states

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[26] *See* p. 2 of the February 17, 2010 opinion denying rehearing, *citing* 2 Thomas J. Schoenbaum, *Admiralty & Mar. Law* § 14-9 (4th ed. 2004).

[27] *Id*

that "When cases concerning maritime collisions only have attenuated links to the United States, the question is not whether subject matter jurisdiction exists, but rather whether courts should abstain from exercising jurisdiction."[28] In other words, the *only* constraint on the exercise of admiralty subject matter jurisdiction is what is now known as the *forum non conveniens* analysis.

The existing case law in this Court has never reached the precise issue posed; namely, whether admiralty subject matter jurisdiction can exist in the absence of *any* interest of the United States or its citizens. A review of the rulings by this Court over the years shows that admiralty jurisdiction has been extended to vessel collisions on the high seas, as well as in the territorial waters of foreign nations. In each of those instances, however, some relationship existed with the United States which would support the assertion of subject matter jurisdiction. In *Pan. R.R. Co.*,[29] this Court found that a tort occurring within the waters of a foreign country may be subject to U.S. admiralty jurisdiction. However, that case involved an American defendant who owned the pier in Panama where the plaintiff vessel sank. Thus, there was an identifiable American interest in the maritime controversy. Likewise, in *Malay. Int'l Shipping Corp.*,[30] the Third Circuit found that admiralty

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[28] *Id.*

[29] *Pan. R.R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 285 (1897).

[30] *Malay. Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349, 355–56 (3d Cir. 2006), *rev'd on other grounds*, 549 U.S. 422 (2007).

jurisdiction existed when a vessel was seized in a Chinese port. Again, this case involved a shipment of steel coils from the U.S. to China, from a U.S. company, under a U.S. bill of lading.

In addition to citing *Napier* and *Sinochem*, the Fifth Circuit cited *Exxon Corp.*,[31] where it had found subject matter jurisdiction over a tort involving a Singapore plaintiff against an American company defendant who was doing business in foreign waters; and *Coats*,[32] which concerned a Mississippi employee of Penrod working in the United Arab Emirates. Apart from the fact that U.S. interests were involved, the real issue in that case was simply whether the injured worker was subject to maritime law rather than state law; hardly an apt comparison. Nonetheless, in both cases cited by the Fifth Circuit, American interests of some sort were present to justify the extension of subject matter jurisdiction to the waters of a foreign nation.

The Fifth Circuit, when confronted with the frailty of its position on application for rehearing, ultimately cited *The Belgenland*,[33] as authority for the unlimited scope of admiralty subject matter jurisdiction hypothesized by Professor Schoenbaum. That case involved a collision between a Belgian and Norwegian

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[31] *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 311 (5th Cir. 1987).

[32] *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1117 (5th Cir. 1995).

[33] *The Belgenland*, 114 U.S. 355 (1885).

vessel in the mid-Atlantic, when one of the vessels was on a voyage to the United States. After the Norwegian vessel sank, the crew was rescued by the Belgenland, which proceeded on to its port of call in Philadelphia, where the master and crew of the Norwegian vessel were delivered and the libel was instituted.

In discussing the circumstances under which an American court should assert jurisdiction over a controversy among foreign parties arising on the high seas, the court noted that the principal of when an action occurs on the high seas, "between persons of different nationalities," it comes "within the domain of the general law of nations, or *communis juri*, are prima facie subjects of inquiry in any Court of Admiralty which first obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious, or injured, parties."[34] The notion Justice Bradley was espousing in the *Belgenland* was far different from the facts of the instant case. There, he was acknowledging that all nations have a potential interest in collisions on the high seas, which are sovereign to none, and that it is appropriate for a United States court to take cognizance of a case between citizens of two different nations when it obtains personal jurisdiction over the rescued or offending ship. This ruling is based on the specific notion of *communis juris*; that is, that the law of the high seas governs and neither party has a greater claim than the other to having its particular nation judge the claim. Nothing in *The Belgenland* intimates that subject matter jurisdiction in admiralty should be

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[34] *Id.* at 362-63.

extended to the territorial waters of other nations to preside over collisions in those waters between vessels of that same foreign nation, where no American interest exists, and where a forum already exists for the resolution of that controversy by the courts and laws of that country.

The waters of Mexico's Exclusive Economic Zone are not synonymous with the "high seas."[35] Thus, the principles of *communis juris* relied upon in *The Belgenland* are inapplicable. Simply, the expectations of the parties in the instant case are quite different from that of the parties in *The Belgenland*. Two Mexican companies whose vessels collide in Mexican waters can and should, and, in fact, did initially file suit in Mexico.

The position of petitioner in this case is consistent with the principles previously espoused by this Court in both finding and declining jurisdiction. Where the interests of the United States in admiralty and maritime commerce are implicated, subject matter jurisdiction exists. That can reasonably be inferred from the Constitution's grant of jurisdiction to all cases arising under the laws of the United States or treaties made with other nations. Exercising subject matter jurisdiction over collisions in foreign waters and over non-resident foreign corporations with no offices in the United States, where no law of the United States or treaty indicates it, is an unwarranted extension of subject matter jurisdiction and poses adverse

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[35] *Humane Soc'y of the U. S. v. Clinton*, 236 F.3d 1320, 1322 (Fed. Cir. 2001).

consequences to United States interests abroad. In *Lauritzen*,[36] this Court, in giving a limited reading of the Jones Act, stated:

> In dealing with international commerce we cannot be unmindful of the necessity for mutual forebearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.[37]

Similarly, in a choice of forum selection clause case, the Supreme Court made the following strong statement about overreaching the scope of American law and policy:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts...We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved by our courts.[38]

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[36] *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

[37] *Id.* at 581-82.

[38] *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

The plaintiff in this case, Protexa, chose to file suit in the United States, for several reasons. In addition to wanting to avoid the consequences of a Mexican Limitation of Liability fund, Protexa hoped to find a favorable haven in the Southern District of Texas, Galveston Division, in the form of Judge Samuel Kent, who has since been forced to resign his office. Regardless of the reasons, however, it is clear that Protexa was forum shopping, despite the forum in its own country that was more than adequate to resolve the issues of this case. By finding subject matter jurisdiction, the district court, and thereafter the Court of Appeals, both encouraged this type of behavior, sending a message to foreign countries and future litigants for the future; namely, that the United States considers all maritime disputes, regardless of location, nationality of parties, or absence of connection to the United States, to be within the subject matter jurisdiction of its courts. America can hardly complain if foreign courts apply the same approach and assume subject matter jurisdiction over collisions in American waters between American-owned-and-operated vessels. This is certainly a possible future consequence of such a broad reading of the grant of jurisdiction.

The Belgenland[39] decision also articulates another basis for subject matter jurisdiction in the event of collision or other vessel-related claims, which is the enforcement of maritime liens by *in rem* attachment.[40]

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[39] *The Belgenland*, 114 U.S. 355 (1885).

[40] *Id.* at 366, *citing The Jerusalem*, 13 F. Cas. 559 (C.C.D. Mass. 1814) (No. 7,293).

That is a completely different issue, insofar as it depends upon the vessel calling in a United States port (thus creating a direct link with the jurisdiction) and also relies upon enforcement of international treaties pertaining to the existence and enforcement of liens (which, again, corresponds to the language of Article 3, Section 2 about treaties). Under the present facts, *in rem* or *quasi in rem* jurisdiction over the ISLA AZTECA never came into play, as the vessel was not seized in any U.S. port.

Subject matter jurisdiction is a threshold issue for United States courts. Either it exists, and the court can proceed to evaluate whether jurisdiction should be accepted or declined for other reasons, or it does not, and the inquiry ends there. No case from this Court decisively controls this issue-that much was apparent to Judge Ellison in his written opinion, and, is implicit in the Fifth Circuit's opinion given the paucity of authority offered to support its result. This is an issue of major significance for the maritime commerce of the United States, and is squarely presented by these facts, making the issue ripe for resolution.

II. Alternatively, The Fifth Circuit Has Misapplied the Doctrine of Forum Non Conveniens to Permit a Case With no Connection to the United States to Be Tried in a United States District Court, Despite Reaching a Contrary Ruling on a Case with Virtually the Same Facts, and Has Departed So Far from the Accepted Course of Resolving Forum Non Conveniens Cases that Supervisory Authority Should be Granted by This Court.

The decision of the Fifth Circuit that no restrictions exist on maritime subject matter jurisdiction, if the claim arises on navigable water somewhere in the world, leads to an inevitable result. The role of gatekeeper in the federal courts for maritime claims from around the world falls to the individual federal district judge, who must undertake, if requested, a *forum non conveniens* analysis. Unfortunately, by delegating this responsibility to the district court, appellate review is made difficult, if not practically impossible, because of the abuse of discretion standard of review. Thus, the issue of subject matter jurisdiction, which is reviewed *de novo* at every stage of the proceedings, is converted into a one time review by the district court, which can only be reversed if the district judge abuses his discretion. This is somewhat mind boggling, since this Court formerly evaluated the issue of whether to retain jurisdiction at the same time and in the same manner as it considered whether subject matter jurisdiction existed in the first place.

This was nowhere more apparent than in the decision of *Canada Malting Co., Ltd.*[41]

In that pre-*forum non conveniens* era, this Court considered whether to decline jurisdiction over a suit between two Canadian corporations arising from a maritime collision that occurred on the Great Lakes. In *Canada Malting*,. the colliding vessels were registered under the laws of Canada, the officers and crew were all Canadian, the cargo was shipped under a Canadian bill of lading, and was being shipped from one Canadian port to another.[42] Thus, in many important respects, the facts are identical to the ISLA AZTECA/TOTONACA collision- with one major exception. The two Canadian vessels collided in a Great Lake between the United States and Canada, within the territorial waters of the United States. Thus, a traditional basis for subject matter jurisdiction existed, or at least a basis why the United States might concern itself with this case-namely, a collision of vessels in United States waters.

Nonetheless, this Court declined to exercise jurisdiction, when it might have done so on that one basis, finding that under the totality of the evidence, it was "difficult to conceive of a state of facts more clearly justifying the refusal of a District Court to retain jurisdiction in a cause between foreigners."[43] This is not idle language, and yet the Fifth Circuit

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[41] *Can. Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413 (1932).

[42] *Id.* at 423.

[43] *Id.* at 424.

failed to consider its implications. If the *Canada Malting* case is the most clear or extreme example of facts justifying the decline of jurisdiction, and that case involved at least one defined relationship to U.S. waters, then the application of *Canada Malting* to the instant case can logically lead to only two conclusions. First, any facts more attenuated than *Canada Malting* means that no subject matter jurisdiction could exist, because the facts of *Canada Malting* are the most extreme example of where jurisdiction exists and still must be declined. Alternately, if the existence or non-existence of a link to the United States has no effect on subject matter jurisdiction (which the Fifth Circuit clearly concluded), then *Canada Malting* and ISLA AZTECA/TOTONACA facts are squarely on point and the case should have been declined on the basis of *forum non conveniens*.

The Fifth Circuit seemed to understand the second point and specifically acknowledged that it "might well not reach the same conclusion under de novo review" of the *forum non conveniens* issue.[44] In this respect, it reinforced the opinion of Judge Ellison, who refused to reverse the original ruling of Judge Kent on the issue, but stated: "Given the facts of this case, this Court likely would have reached a different conclusion if it had been considering Defendant's motion to dismiss eighteen months ago."

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[44] *Perforaciones Exploracion y Produccion v. Maritimas Mexicanas, S.A. de C.V.*, No. 08-41021, 2009 U.S. App. LEXIS 26746, at *10 (5th Cir. December 9, 2009).

Both the Fifth Circuit panel and Judge Ellision knew that the *forum non conveniens* result was wrong, but refused to do anything about it—the *Canada Malting* precedent from this Court notwithstanding. So what happened? The Fifth Circuit panel felt obliged to give great deference to the original ruling on *forum non conveniens* by Judge Kent. As will be shown below, this was inappropriate, as Judge Kent's own analysis is defective on its face. Second, the Fifth Circuit bolstered its unwillingness to act, citing the alleged advanced stage of the proceedings; *i.e.*, that the case was too far advanced to correct the judicial error. If MarMex was forced to wait until the issue had become ripe, it would seem that its right to argue an inconvenient forum would not thereby be impaired. Apart from the fact that this was incorrect (the crux of the case was and remains the damage trial, which has not yet occurred), the Fifth Circuit had turned down a review of this same issue a year earlier on the grounds that it was premature.

Applying the two part analysis of *Piper Aircraft*,[45] Judge Kent acknowledged that an adequate forum existed in Mexico and that Mexican law would allow redress of the claims between the parties. Going on to the private and public factors, the district court wrote a two paragraph conclusory statement about private factors, with absolutely no citation to the briefs of the parties or to the facts themselves. Instead of undertaking an analysis of all the factors and attempting to balance them, the district court simply swept past the facts with conclusory statements like

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[45] *Piper Aircraft v. Reyno*, 454 U.S. 235, 255-56 (1981).

"many of the relevant documents have already been produced," "several witnesses amenable to this Court's jurisdiction," and "the location of the parties is equally inconvenient whether this matter is tried in Mexico or tried in Galveston." With respect, this constituted no private factor analysis at all, and thus represented an abuse of discretion for this reason alone. Similarly, Judge Kent's public factor analysis consisted, it appears, of deciding whether it was convenient for his docket to hear the case—an analysis of a mere nine lines.

The Fifth Circuit's affirmance of the district court on this analysis is curious. Although it is longer than Judge Kent's analysis of both the public and private interest factors, it similarly fails to address each of the detailed private and public factors as indicated by *Piper*. Significantly, before a court even reaches the public factor/private factor analysis, it should determine whether an adequate forum is available in the foreign country and then whether the law of the United States or that country should apply. The District Court found that Mexico was an adequate forum, but then erroneously determined that the case would be determined by U.S. law - despite lacking a basis to make such a conclusion - a result that was later overturned. Had the district court made the right decision on the issue of substantive law, it would have dismissed the case then and there, never reaching the private and public balancing factor test.[46]

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[46] *See, Piper Aircraft*, 454 U.S. 235.

Instead, the Fifth Circuit gave the district court the benefit of the doubt on this error and proceeded to consider the district court's private/public factor balancing analysis. Despite the absence of any detailed analysis by the lower court, and despite the abundance of factors militating against keeping the case in the United States, the Court of Appeals panel followed the path of least resistance and found no abuse of discretion.

What makes this determination untenable and demanding of correction is the fact that a separate panel of the Fifth Circuit, on a case with facts no more compelling than those presented here, reached an entirely opposite conclusion. Worse, the case originated from the same Judge Kent, who there found that his court presented a convenient forum. That decision,[47] involved a Mexican citizen who died working aboard the PRIDE MISSISSIPPI, a drilling vessel leased to PEMEX, the national oil company of Mexico. The accident occurred 47.18 nautical miles from Ciudad Del Carmen, offshore of the Eastern Coast of Mexico. Pemex controlled the well and provided a drilling crew to man the rig. Plaintiff was employed by a Mexican corporation contracted to PEMEX. Although the Mexican Ministry of Labor had already assumed jurisdiction of the accident and investigation, Plaintiff's family filed suit in the United States District Court for the Southern District of Texas. Judge Kent rejected the defendants' *forum non conveniens* challenge. After some procedural wrangling over expert credibility and integrity, the

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[47] *Saqui v. Pride Cent. Am., L.L.C.*, 595 F.3d 206 (5th Cir. 2010).

issue of forum *non conveniens* was renewed at the district court level, and, ultimately, a new District Judge who had replaced Kent by this time, granted the *forum non conveniens* motion. This result was sustained on appeal by the Fifth Circuit; again, on the basis that no abuse of discretion occurred.

The only real differences between *Saqui* and the present case are that: 1) only one party had voluntarily submitted to the jurisdiction of Mexican law in Saqui, whereas both parties initially did so in the instant case (which makes the instant case stronger than *Saqui* for a *forum non conveniens* dismissal); and 2) the district judge who replaced Judge Kent took the step of reversing his earlier ruling rather than deferring that responsibility to the Fifth Circuit, as Judge Ellison did in this case.

Abuse of discretion is only a standard. It is not a means for reviewing courts to avoid making correct and consistent rulings. Otherwise, the doctrine of *forum non conveniens* is no doctrine at all; it becomes merely a hodgepodge of factors, any one of which a district court is free to disregard or accord no weight. If that is true, the law in this area is merely what any individual district court says it is. Where two cases with the same *forum non conveniens* issues are decided differently a month apart by the same Court of Appeals and arise from bad decisions made by the same district judge (both in favor of retaining a case with no connections to the forum), and the only difference is that in one instance, the district judge who assumed the case corrected it, while the other did not, something is squarely out of joint at the Fifth Circuit.

When this was pointed out in an application for rehearing en banc, it was ignored, and not even addressed in the opinion denying rehearing. Instead, the original panel issued a brief opinion that rather petulantly offered up several ostensible connections to the United States that were totally absent from the district court opinion and were supplied in supplement briefs from Protexa. Included among this after-the-fact rationalization were the fact that the ISLA AZTECA allegedly called in a U.S. port years after the collision; that MarMex had filed suit once in the United States; that the ISLA AZTECA had been a U.S.-flagged vessel once in its career; that a U.S. citizen trained the ISLA AZTECA captain and had once been on the vessel six weeks before the allision. These fleeting contacts are so insubstantial as to be almost amusing, but for the fact that they were cited by the Fifth Circuit—although how these represent private or public factors was never explained.

By contrast, MarMex set forth to the District Court, and thereafter to the Fifth Circuit, the following key public and private interest factors, which compel dismissal on *forum non conveniens* grounds:

Private Factors

Under *Piper*, the private factors required to be considered are: relative ease of access to sources of proof, (2) availability of compulsory process for attendance of witnesses, (3) cost of obtaining attendance of witnesses, (4) possibility of viewing premises, (5) other practical problems that would make trial of a case easy, expeditious, and inexpensive, and (6) whether the plaintiff has sought to vex, harass or oppress the defendant. The district court simply

ignored one through five and focused on the fact that Protexa was not guilty of six. In fact, those first five factors all favored dismissal of the United States proceeding. MarMex had and continues to have more difficulty in obtaining access to sources of proof and witnesses than in Mexico, where it might have a court compel the attendance of both. For example, the TOTONACA was repaired in Mexico. While surveyors might have their own opinions of the cost of repairs, if MarMex wanted to discover more details of the actual costs of repair, it cannot do so from the United States.

Likewise, MarMex requested depositions of key witnesses who were employees of Protexa.[48] In response, counsel for Protexa advised that seven of the key witnesses (almost half of those requested) were no longer employed by Protexa and were located throughout Mexico.[49] These witnesses included the manager of repairs on the TOTONACA, personnel involved in the repairs, the Protexa Director of Maintenance, the TOTONACA superintendent and members of the TOTONACA crew.[50] Not one of these individuals was available for depositions or could be compelled to testify in the case by a United States court.

In addition, MarMex issued letters rogatory to fifteen subcontractors of Protexa to establish whether Protexa paid its subcontractors some $867,000 of the

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[48] 1S 562-68.

[49] *Id.*

[50] *Id.*

damages it is seeking. Not one letter rogatory was returned.[51] It goes without saying that MarMex would save substantial sums bringing damage witnesses to a trial in their home country of Mexico, rather than arranging for their travel to the United States. Simply, a case that is to be tried based on the testimony of Mexican residents and Mexican shipyard documents is inherently easier to try in Mexico and quite difficult to try in the United States, absent voluntary cooperation of witnesses, not under any compulsion to render assistance.

Public Factors

A review of the private factors, again, should have warranted dismissal without the need to look at the public factors.[52] If that were not enough, the district court should have looked to the public factors: namely, (1) administrative difficulties; (2) reasonableness of imposing jury duty; (3) holding the trial in view of those affected; and (4) local interest in having localized controversies decided at home. Clearly, two was not a factor, since it was a judge-tried case. However, the district court would have the following administrative difficulties: the determination of and application of appropriate Mexican law, the inability to enforce Letters Rogatory entered in the case, the use of translators, translated and untranslated documents, inability to compel attendance of key witnesses, extended trial time due to use of translators, and

[51] IS 1249-61 & IS 2122-2319.

[52] *Baris v. Sulpico Lines*, 932 F.2d 1540, 1550-51 (5th Cir. 1991)

potential witness travel issues at the time of trial. Three clearly favors dismissal, for holding a trial in view of all the difficulties, works a hardship on MarMex. Four also favors dismissal, as the Republic of Mexico has a demonstrable interest in having its citizens resolve controversies between themselves arising in Mexican waters take place in Mexican courts, and to avoid having its citizens summoned to other jurisdictions for trial testimony, and to see the correct application of its own substantive law to its own citizens. Neither the district court nor Protexa could dispute this—rather, they ignored it altogether or simply said it did not matter.

In the end, the issue of *forum non conveniens* was not close at all. The reasons for dismissal were plentiful and substantial. By contrast, the reasons set forth by the district court for sustaining jurisdiction were slender, and, in the case of the substantive law to be applied, completely wrong. In *Veba-Chemie*,[53] the Fifth Circuit upheld a conditional dismissal, declining to exercise subject matter jurisdiction on *forum non conveniens* grounds where the dispute was between foreign nationals, whose vessels collided on the high seas and the sole relevant contact with the United States was the presence of the defendant's vessel in a United States port over a year following the collision. That contact was more substantial than the rather embarrassing "contacts" cited by the Fifth Circuit in its denial of rehearing: that the ISLA AZTECA was previously owned by a U.S. company, that a U.S. citizen once trained the captain of the vessel, or that

[53] *Veba-Chemie AG v. M/V GETAFIX*, 711 F.2d 1243 (5th Cir. 1983).

third parties who were operating out of the United States inspected the repairs to the ISLA AZTECA. None of the facts cited by the Fifth Circuit amounted to any type of contact that related in any way to MarMex's operation of the vessel, the collision, or MarMex's operations in general.

The foregoing discussion certainly explains why the Fifth Circuit reached an incorrect and unfair result. This Court should intervene to correct this bad result because 1) it is plainly at odds with this Court's decision in *Piper;* 2) it represents bad precedent for the exercise of discretion by district courts in the future *forum non conveniens* cases; 3) suggests wrongly that disputes quite clearly have no connection with the United States court system can avoid dismissal on the whim of the district court – a clear encouragement for forum shopping; and 4) Judge Kent's deliberate disregard of established precedent by failing to apply all of the *forum non conveniens* factors to the facts, and the Fifth Circuit's failure to correct it, despite having reached an entirely different result in *Saqui*, were so egregious as to require this Court to exercise its supervisory authority.

CONCLUSION

MarMex, a Mexican corporation, had no reasonable expectations that it would ever be hailed into a Texas federal court by virtue of operating a Mexican-flagged vessel in the Bay of Campeche, while working for a Mexican oil company, and with no discernible ties to the United States. Yet, somehow, it was, through an expansive unjustified extension of admiralty subject matter jurisdiction and a thoroughly mangled *forum non conveniens* analysis. As precedent, this decision

can only serve to encourage forum-shopping within the United States, and as an incentive for foreign courts to employ the same logic to force unhappy United States litigants into admiralty courts in corners of the world with no connection to the casualty. The maritime law of the United States neither contemplates nor countenances such a result, and this Court is urged to accept certiorari and draw the bright line on admiralty subject matter jurisdiction that is so clearly needed.

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[1] The District Clerk's record is divided in three parts. The first will be referred to herein as "*OV*" for Original Volume, comprised of Document Nos. 1-102, at bates 1-2908; the second as "*1S*" for First Supplemental Volume, comprised of Document Nos. 103-281, at bates 1-5025; the third as "*2S*" for Second Supplemental Volume, comprised of Document Nos. 282-346, at bates 5026-5860.

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Appendix K: Docket Sheet; October 26, 2007. DN 179; 10/26/2007; 1S 1-47, at 1S 24. . . . . 135a

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-41021

[Filed December 9, 2009]

PERFORACIONES EXPLORACIÓN Y PRODUCCIÓN, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing to Reinsurance Contract No. AHE 03004 As Amended to No. AHE-04004	)
Plaintiffs-Appellees	)
v.	)
MARÍTIMAS MEXICANAS, S.A. DE C.V., also known as MarMex	)
Defendant-Appellant	)

Appeal from the United States District Court for the Southern District of Texas, Galveston Division
USDC No. 05-CV-00419

Before BENAVIDES, DENNIS, and ELROD, Circuit Judges.

PER CURIAM:*

Appellant Marítimas Mexicanas, S.A. de C.V. ("MarMex") appeals from several rulings in favor of Appellee Perforaciones Marítimas Mexicanas ("Protexa") in an ongoing case concerning an allision between two vessels in the Gulf of Campeche, off the Mexican coast. For the reasons described below, we affirm the district court and remand to allow trial to proceed on the scope of damages awardable to Appellees.

I.

On March 31, 2004, a supply vessel, the M/V ISLA AZTECA (the "ISLA AZTECA"), allided with a mobile operating drilling unit, the MODU/TOTONACA (the "TOTONACA"), in the Bay of Campeche, approximately 45 miles off the Mexican coast. The ISLA AZTECA allegedly damaged the TOTONACA as a result of their allision. At the time of the accident, MarMex owned and operated the ISLA AZTECA, and Protexa owned the TOTONACA. Both MarMex and Protexa are Mexican entities, and both the ISLA AZTECA and the TOTONACA were Mexican flagged vessels on the date of the allision. The allision occurred beyond Mexican territorial waters but within Mexico's exclusive economic zone ("EEZ"). Under the United Nations Convention on the Law of the Sea ("UNCLOS"), Mexico does not exercise full sovereignty over its EEZ, but rather has certain "sovereign rights"

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

within the zone, including control over the economic exploitation and environmental protection of the sea's natural resources. *See* UNCLOS art. 56, Dec. 10, 1982, 1833 U.N.T.S. 397; 1 THOMAS J. SCHOENBAUM, ADMIRALTY & MAR. LAW § 2-16 (4th ed. 2004).[1]

Shortly after the allision, MarMex commenced a limitation action in Mexico under the Convention on Limitation of Liability for Maritime Claims (the "1976 Convention"), Nov.19,1976, 1456 U.N.T.S. 221, as codified in the Mexican Law of Navigation, and posted a bond of $427,460.97 to satisfy any claims arising out of the allision. Commencing a limitation action allows shipowners to avoid catastrophic liability for accidents at sea involving their vessels, capping potential damages based on some measure of the value of their ship and bringing multiple claimants into a single action. 2 SCHOENBAUM, *supra*, § 15-1. The United States is not party to the 1976 Convention, *id.*, but rather has its own Limitation of Liability Act, codified at 46 U.S.C. §§ 30501–30512 (2006). To date, Protexa has not filed a claim against MarMex in the Mexican limitation proceeding.

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[1] The United States has been a UNCLOS signatory for nearly three decades, but the Senate has not yet ratified the treaty. Nevertheless, the United States has declared that the provisions of UNCLOS establishing EEZs are declarative of customary international law. *See Mayaguezanos por la Salud y el Ambiente v. United States*, 198F.3d 297, 304 n.14 (1st Cir. 1999).

On July 28, 2005, Protexa[2] and its insurance underwriters filed suit against MarMex in federal district court in Galveston, Texas, attempting to hold MarMex liable for the alleged damage to the TOTONACA. MarMex eventually filed a motion to dismiss Protexa's suit on grounds of lack of subject matter jurisdiction, forum non conveniens, and international comity, but the district court denied the motion and allowed this case to proceed in the United States. Subsequently, the district court performed a conflicts of law analysis and ruled that Mexican substantive law, specifically Article 1913 of the Mexican Civil Code, would apply to the case, but also held that the limits to recovery established by the 1976 Convention were procedural and therefore were inapplicable in U.S. court.

For trial, the district court bifurcated the trial between liability and damages to allow the Fifth Circuit to provide guidance to the court before addressing damages. After a brief bench trial during which MarMex stipulated that the ISLA AZTECA had allided with the TOTONACA, the district court found that MarMex was liable to Protexa for the allision.

On appeal, MarMex asserts that this case should be dismissed for lack of subject matter jurisdiction, forum non conveniens, and international comity. It also argues that the district court erred when it concluded that the 1976 Convention is procedural and

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[2] Perforaciones Exploración y Producción ("PEP"), an affiliate of Protexa, initially filed suit against MarMex. However, when it became clear that Protexa was the real party in interest, and not PEP, the district court granted leave for the plaintiffs to amend their complaint, substituting Protexa for PEP.

consequently may not be used to limit MarMex's liability in this case. We address these issues in turn.

II.

Whether a district court possesses subject matter jurisdiction is a question of law, reviewed de novo on appeal. *See Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 (5th Cir. 2008). 28 U.S.C. § 1333(1) provides that "[t]he district courts shall have original jurisdiction . . . of . . . [a]ny civil case of admiralty or maritime jurisdiction . . . ." We determine that the district court does have subject matter jurisdiction under section 1333 to resolve this dispute.

MarMex contends that subject matter jurisdiction under section 1333(1) cannot reach an allision that occurred in Mexico's EEZ, relying primarily on *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971). In *Victory Carriers*, the Supreme Court stated that "the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and . . . maritime law governs only those torts occurring on the *navigable waters of the United States*." *Id.* at 205 (emphasis added). However, the weight of authority, including the precedent of the Supreme Court, supports the view that there are no clear territorial limits to federal maritime tort jurisdiction. *See, e.g., Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 285 (1897) ("[T]he law is entirely well settled . . . that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court."); *Malay. Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349, 355-56 (3d Cir. 2006) (seizure of ship at Chinese port establishes admiralty jurisdiction), *rev'd on other grounds*, 549 U.S. 422 (2007); *Coats v. Penrod Drilling*

Corp., 61 F.3d 1113, 1117-19 (5th Cir. 1995) (finding admiralty jurisdiction over tort in territorial waters of United Arab Emirates); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 311 (5th Cir. 1987) (finding that "admiralty jurisdiction over claims by Singapore plaintiffs on an alleged tort in Singapore" is "undoubted"), *rev'd on other grounds*, 486 U.S. 140 (1988). Consequently, we find MarMex's reliance on *Victory Carriers* to be unfounded. The statement in *Victory Carriers* appearing to limit jurisdiction to the navigable waters of the United States is dicta. *Victory Carriers* concerned whether jurisdiction under section 1333(1) reached an accident that occurred on a pier in Alabama, and did not address whether jurisdiction reaches the high seas or waters under the control of a foreign state. 404 U.S. at 203-04.

MarMex also argues that even if these cases are controlling, there can be no admiralty jurisdiction over maritime collisions unless the parties or their dispute have some clear link to the United States. While the strength of a case's ties to the United States are clearly relevant for a forum non conveniens or choice of law analysis, it does not impact whether a court has admiralty jurisdiction under section 1333(1). *See Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 177-78 (3d Cir. 1995); *Kim v. Frank Mohn A/S*, 909 F. Supp. 474, 476-77 (S.D. Tex. 1995). Consequently, we are confident there is subject matter jurisdiction over the allision of the TOTONACA and the ISLA AZTECA.

III.

Even if there is jurisdiction, as in this case, dismissal may still be appropriate under the doctrine of forum non conveniens. However, "[t]he forum non

conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a *clear abuse of discretion*; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Karim v. Finch Shipping Co.*, 265 F.3d 258, 268 (5th Cir. 2001) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)).

Courts considering dismissal for forum non conveniens must carry out a two-step test. First, the defendant seeking dismissal must establish that there is an alternate forum that is both available and adequate. *McLennan v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 424 (5th Cir. 2001). Since the parties do not seriously contest the availability and adequacy of the Mexican limitation action on appeal, we proceed to the next step. Second, the defendant must demonstrate that "private and public interests weigh *heavily* on the side of trial in the foreign forum." *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1164 (5th Cir. 1987) (emphasis added), *vacated*, *Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 103 (1989), *reinstated in pertinent part*, 883 F.2d 17 (5th Cir.1989).[3] "A defendant . . . bears the

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[3] The private interest factors to be weighed include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive; enforceability of judgment; and whether the plaintiff has sought to vex, harass, or oppress the

burden of invoking the doctrine and moving to dismiss in favor of a foreign forum. This burden of persuasion runs to all the elements of the forum non conveniens analysis." *Id.* (internal citations removed).

Although we might well not reach the same conclusion under de novo review, since the district court's refusal to dismiss this case resulted from "an exercise in structured discretion founded on a procedural framework," it is not a clear abuse of discretion. *Id.* at 1165. With regard to private interests, MarMex asserts that this case would be better litigated in Mexico because certain Spanish language documents remain untranslated and because it cannot access certain evidence regarding the repairs made to the TOTONACA after the allision. However, in the district court's analysis, it considered that certain evidence might be inaccessible if this case were to proceed in the United States and it also assumed that certain documents had not yet been translated. It simply found that these concerns were outweighed by other factors, such as the delay that would accompany dismissal, the relative proximity of Galveston to the

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defendant.

Karim, 265 F.3d at 269 n.14 (quotation marks and brackets omitted). The public interest factors include

> the administrative difficulties flowing from court congestion; the local interest in having localized controversies resolved at home; the interest in having the trial . . . in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Air Crash Disaster, 821 F.2d at 1162-63.

site of the accident, the completed translation of other documents, and the availability of many witnesses.

With regard to public interests, the district court concluded that Mexico has an interest in resolving this dispute in its courts, but again, found this to be outweighed by other public interest factors, as it concluded that this case would not overburden its docket and that a jury trial would not be necessary. We do note that the district court based its public interest analysis on the assumption that U.S. substantive law would apply in this case, an assumption that later proved to be unfounded. However, a district court need not conduct a conflicts of law analysis before ruling on forum non conveniens, *id.* at 1163 n.25, and as a result, we can hardly condemn this mistake. We conclude that the application of Mexican substantive law in this case does not undermine the district court's entire analysis, especially under this deferential standard of review.

The advanced stage of these proceedings also affects our review of the district court's decision to retain this case, as "[t]he fact that a trial on the merits has occurred in the plaintiff's selected forum does have some effect on our decision of whether the district court abused its discretion in maintaining the action before it." *Id.* at 1167. Although the trial in this case has not yet reached the damages stage, MarMex has already been found liable to Protexa. Moreover, this litigation has now proceeded in our courts for more than four years, and its resolution is finally in sight. MarMex has not demonstrated that it would be "greatly prejudiced" if trial were to go forward in this country on damages. *Id.* at 1168. Although some evidence concerning the cost of the repairs to the

TOTONACA may be unavailable in this country, MarMex has not proven that this evidence would be any more available if this case were to proceed in Mexico. Additionally, since the district court denied MarMex's motion to dismiss in 2006, new evidence has come to light suggesting that Galveston may be a more convenient forum than it initially appeared: MarMex conducts some business in the United States, and the ISLA AZTECA has called on U.S. ports from time to time. Given these considerations, since the district court weighed all relevant factors, and we do not find its analysis unreasonable, we find that the district court did not abuse its discretion by denying a forum non conveniens dismissal.

IV.

MarMex also contends that the district court erred when it did not dismiss Protexa's suit out of respect for international comity. A district court's decision to exercise or decline jurisdiction in the face of possible international comity concerns is reviewed for abuse of discretion. *Seguros Del Estado, S.A. v. Scientific Games, Inc.*, 262 F.3d 1164, 1169 (11th Cir. 2001); *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998). We conclude the district court did not abuse its discretion.

Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Dismissal of a suit on international comity grounds may sometimes be appropriate when there is litigation pending in a

foreign forum or, even absent such litigation, when allowing a case to proceed in the United States would intrude on the interests of a foreign government. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004).

MarMex relies on *Sequihua v. Texaco, Inc.* to suggest that this case should be dismissed out of deference to Mexican interests. 847 F. Supp. 61 (S.D. Tex. 1994). However, this case is readily distinguishable from *Sequihua*, where a district court dismissed a suit alleging pollution affecting a third of Ecuadorian territory after Ecuador had "expressed its strenuous objection to the exercise of jurisdiction." *Id.* at 63. Mexico has remained silent in this case, and while the TOTONACA was engaged in oil exploration at the time of the allision, it is unclear how the resolution of this private dispute by a U.S. court would impede Mexico's ability to exercise its sovereign rights over economic exploitation within its EEZ. *See* UNCLOS art. 56, *supra*.[4]

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[4] We note that *Sequihua* is inapposite in this case for another reason. In *Sequihua*, the district court relied on section 403 of the Restatement (Third) of the Foreign Relations Law of the United States to guide its analysis. 847 F. Supp. at 63. However, section 403 is not relevant to MarMex and Protexa's private law dispute, as section 403 concerns prescriptive jurisdiction, the authority of the United States to make its *public* law applicable extraterritorially. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, ch. 1, subch. A introductory note ("[Section 403] concentrates on so-called public law—tax, antitrust, securities regulation, labor law, and similar legislation. . . . [T]he rules stated in [Section 403] do not necessarily apply to controversies unrelated to public law issues.").

Additionally, MarMex has failed to cite any case where a U.S. court has deferred to a foreign limitation proceeding on international comity grounds. Limitation proceedings commenced under U.S. law only receive domestic recognition, *Otal Invs. Ltd. v. M.V. Clary*, 494 F.3d 40, 63 (2d Cir. 2007); *Matter of Bouboon Sangsa Co.*, 720 F.2d 595, 599 (9th Cir. 1983) ("Because a decree in limitation normally receives only domestic recognition, 'the courts of each country will apply local law on the question of limitation; no country will give effect to a foreign limitation decree as barring further suit.'" (internal brackets removed) (quoting GRANT GILMORE & CHARLES BLACK, THE LAW OF ADMIRALTY 945 (2d ed. 1975))), and although the 1976 Convention requires its signatories to defer to certain limitation proceedings abroad, the United States has not adopted the Convention. 2 SCHOENBAUM, *supra*, § 15-1 n.7. Given these considerations, the district court's decision not to defer to the Mexican limitation proceeding on comity grounds does not rise to being an abuse of discretion.[5]

V

Finally, MarMex asserts that the district court erred in determining that the limits on liability established by the 1976 Convention and codified in Mexican law are procedural and thus cannot be applied in United States court. "This Court reviews questions of law, including conflicts of law questions,

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[5] We do not mean to suggest that a district court could not properly exercise its discretion to dismiss a case under forum non conveniens when a party has commenced a foreign limitation action.

de novo." *Cantu v. Jackson Nat'l Life Ins. Co.*, 579 F.3d 434, 437 (5th Cir. 2009) (quoting *Abraham v. State Farm Mut. Auto. Ins. Co.*, 465 F.3d 609, 611 (5th Cir.2006)). Similarly, determinations of foreign law are reviewed de novo on appeal, and courts may consider information from any relevant source, including information not considered by the district court. *See* Fed. R. Civ. P. 44.1; *Grupo Protexa, S.A. v. All Am. Marine Slip*, 20 F.3d 1224, 1239 (5th Cir. 1994).

The leading case on conflicts of law in this area is *Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd. (The Norwalk Victory)*, 336 U.S. 386 (1949). In *The Norwalk Victory*, the Supreme Court held that U.S. courts may apply a foreign limit on liability, but only when the limit is substantive and "attaches" to the right of recovery created by foreign law, as opposed to merely "provid[ing] procedural machinery by which claims otherwise created are . . . scaled down to their proportionate share of a limited fund." *Id.* at 396. MarMex argues that we should perform a "policy-based conflicts analysis" to determine which liability limit applies in this case, relying on a reading of *The Norwalk Victory* advanced in *Complaint of K.S. Line Corp.*, 596 F. Supp. 1268, 1270-72, 1274 (D. Alaska 1984). However, we have never adopted such an approach, finding instead that "United States courts 'must apply foreign limitation law if the substantive liability of the parties is governed by a foreign law *and* if the limitation law of the foreign country is such an integral part of the substantive law governing the action that it can be said to 'attach' to the substantive liability law.'" *Karim*, 265 F.3d at 270 (quoting *In re Korea Shipping Corp.*, 919 F.2d 601, 604-05 (9th Cir. 1990)). In other words, the term "substantive" is a term of art, referring to how integral

a cap on liability is to a cause of action. *Korea Shipping Corp.*, 919 F.2d at 605.

We conclude that the cap on liability created by the 1976 Convention does not attach to the right of recovery created by Article 1913 of the Mexican Civil Code. The 1976 Convention does not create a right of recovery, but only limits the recovery available under Article 1913 and other sources of liability. *See* 1976 Convention art. 2, *supra*, 1456 U.N.T.S. at 223 ("[T]he following claims, *whatever the basis of liability may be*, shall be subject to limitation of liability . . . ." (emphasis added)). We find the reasoning in *Matter of Bethlehem Steel Corp.* persuasive, where a district court held that a cap on liability established by the Canada Shipping Act should not be applied in U.S. court, as the cap did not "limit the individual claimant's right to recover certain categories of damages," but instead served "only to measure or quantify damages." 435 F. Supp. 944, 948 (N.D. Ohio 1976); *aff'd*, 631 F.2d 441 (6th Cir. 1980). Additionally, the cap on liability established by the 1976 Convention is not "substantive" because it is not so integral as to follow liability under Article 1913 in all maritime cases, as an absolute cap on recovery would. The 1976 Convention provides only that "[l]imitation of liability *may* be invoked" by a shipowner, not that it must be applied by a court as an absolute limit to liability. 1976 Convention art. 10, *supra*, 1456 U.N.T.S. at 227 (emphasis added). As a result, the limits established by the 1976 Convention are not substantive—liability under Article 1913 in a maritime case could exceed the cap established by the 1976 Convention. *Cf. The Norwalk Victory*, 336 U.S. at 395 (suggesting that "if it is the law of Belgium that the wrong creates no greater liability than that recognized by the

Convention of 1924," then the Convention's limit on liability would be substantive). The district court did not err in finding the Mexican limit on liability inapplicable in this case.

VI.

For the foregoing reasons, the district court is AFFIRMED and this case is REMANDED to allow trial to proceed on damages.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-41021

[Filed December 9, 2009]

PERFORACIONES EXPLORACIÓN Y PRODUCCIÓN, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing to Reinsurance Contract No. AHE-03004 As Amended to No. AHE-04004	)
Plaintiffs-Appellees	)
v.	)
MARÍTIMAS MEXICANAS, S.A. DE C.V., also known as MarMex	)
Defendant-Appellant	)

Appeal from the United States District Court for the Southern District of Texas, Galveston
D.C. Docket No. 3:05-CV-419

Before BENAVIDES, DENNIS, and ELROD, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:05-cv-419
(ADMIRALTY)

[Filed September 2, 2008]

PERFORACIONES MARITIMAS MEXICANAS S.A. de C.V. and CERTAIN REINSURING UNDERWRITERS SUBSCRIBING TO REINSURANCE CONTRACT NO. AHE-030044 AS AMENDED TO NO. AHE-04004,	)
Plaintiffs,	)
v.	)
SEACOR HOLDINGS, INC., GRUPO TMM S.A. de C.V., and MARITIMA MEXICANA S.A. de C.V.,	)
Defendants.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Status of the Case

This lawsuit was filed on July 28, 2005 in the Southern District of Texas, Galveston Division against Seacor Holding, Inc., Grupo TMM S.A. de C.V. and Maritima Mexicana, S.A. de C.V. ("MarMex"). Seacor was dismissed from the lawsuit. Plaintiffs' counsel initially named Perforaciones Exploration y Produccion as Plaintiff, but were subsequently allowed to amend their Complaint to name Perforaciones Maritimas Mexicanas, S.A. de C.V. ("PMM) as Plaintiff.

The case involves an allision between Defendants' Mexican flagged supply vessel, the ISLA AZTECA, and Plaintiffs' Mobile Offshore Drilling Unit TOTONACA, another Mexican flagged vessel. It is undisputed that the allision occurred on March 31, 2004 in Mexico's Bay of Campeche. It is undisputed that both Plaintiff Perforaciones Maritimas Mexicanas and Defendant Maritima Mexicana (MarMex) were incorporated in Mexico.

In July 2006, the Predecessor Court denied Defendants' motion to dismiss on *forum non conveniens*, principles of international comity, and for lack of subject matter jurisdiction. In November 2006, the Fifth Circuit dismissed Defendants' interlocutory appeal of that Order, finding that the Order did not determine the parties' substantive rights and liabilities. *See Perforaciones Exploracidn y Production et al. v. Grupo WS A et al.*, No. 6-41228 (5th Cir. Nov. 30, 2006). In May 2007, the Predecessor Court determined that Mexican substantive law would be applied to this case and that Article 1913 of the

Mexican Civil Code was applicable as Mexican substantive law.

The case was reassigned to this Court in October 2007. The Court denied Defendants' motions to reconsider the Predecessor Court's orders denying dismissal of the case and finding that Article 1913 of the Mexican Civil Code would apply to the case. In April 2008, the Court granted Defendants' request to bifurcate the case, and parties agreed that the sole issued to be tried by this Court under Article 1913 were: 1) Whether Grupo TMM was a "user" of the ISLA AZTECA; and 2) Whether there was a causal relationship between the allision and the damage to the TOTONACA's spud cans.[1]

This case was tried to the Court on May 5-6, 2008. Pursuant to Federal Rule of Civil Procedure 52, the Court's findings of fact and conclusions of law are set forth below.

II. EVIDENTIARY RULINGS

At the Bench Trial, the Court took under advisement the question of whether to exclude the testimony of Defendants' expert, Gregg Perkin, and whether to admit Plaintiffs' Exhibit 426.

A. Gregg Perkin

Mr. Perkin is a mechanical engineer and owner of a metallurgical laboratory, though he is not himself a

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[1] *See infra*, Part III (C), (E), for a detailed description of the spud cans.

metallurgist. According to Plaintiffs, Mr. Perkin was initially designated to provide an opinion as to loss of hire. Defendants point out that Mr. Perkin provided a report to Plaintiffs early in the litigation discussing the spud can cracks and his inability to determine their causes, and that Plaintiffs had the opportunity to depose Mr. Perkin about his report. Mr. Perkin testified to the fact that he cannot say what caused the cracks to the spud can to leg connections,[2] that there is testing that could have been done that would have revealed the cause of the cracks, and that the testing was not performed.[3] In response to questioning by Plaintiffs, Mr. Perkin also testified that he has not seen the prior welds to the TOTONACA spud cans and that his report may have been based on drawings of spud can cracks identified in 2000, and not 2004. Mr. Perkin also admitted he did not have experience with regard to leg repairs.

The Court finds that Mr. Perkin's testimony should be admitted. Plaintiffs' Motion, Doc. No. 273, is therefore **DENIED**.

B. Plaintiffs' Exhibit 426

Plaintiffs offered into evidence Exhibit 426, a report by Beacon Maritime regarding inspections of the spud can to leg connections of the TOTONACA and the

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[2] *See infra*, Part III (C), (E), for a detailed description of the TOTONACA spud cans and the spud can to leg connection cracks.

[3] As the Court explains in its Findings of Fact, Plaintiffs' expert Jacob Alford appears to agree with Mr. Perkin that destructive testing could have explained the cause of the cracks and that the testing was not done.

cracks identified in those connections in 2004.[4] The Beacon Report also includes a report from ASH related to these inspections.

Defendants argue that the Beacon Report is inadmissible hearsay and that the ASH report is hearsay within hearsay. Plaintiffs did not provide testimony of a custodian or other qualified witness, or certification of the reports as required by Federal Rule of Evidence 803(6), which establishes a hearsay exception for records of regularly conducted activity.

Plaintiffs urge the Court to admit Exhibit 426 under Federal Rule of Evidence 807. Rule 807 provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 807.

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[4] *See infra*, Part III (C), (E), for a detailed description of the TOTONACA spud cans and the spud can to leg connection cracks.

Defendants further object to the admission of Exhibit 426 because Plaintiffs failed to disclose witnesses related to the ASII inspection, specifically David Carpenter, whose name appears repeatedly as "Inspector" in the ASII report. Plaintiffs maintain that these documents were exchanged in discovery, and that it was unreasonable for counsel for Plaintiffs to itemize every single repairman who worked on the rig.

The Court finds that the Beacon Report and the AS11 inspection report, Exhibit 426, is inadmissible hearsay outside any Rule 803 exception and should not be admitted under Rule 807.

Plaintiffs' expert, Mr. Jacob Alford, testified that he relied on Exhibit 426 in formulating his opinions. Defendants also appear to object to Mr. Alford's reliance on the document or testimony interpreting the document, because Mr. Alford admitted that he is not an expert on spud can design and repairs.

The Court will allow Mr. Alford's testimony regarding the location of the cracks in the spud can to leg connections of the TOTONACA. Mr. Alford's reliance on Exhibit 426 is permissible pursuant to Federal Rule of Evidence 703.

C. Other Evidentiary Motions

Plaintiffs' Motion to Exclude Testimony of Defendants' Expert D.J. Green, Doc. No. 273, and Defendant's Motion to Exclude Testimony of Plaintiffs' Expert Mario Carlin, Doc. No. 251, are **DENIED AS MOOT**. Neither of these experts testified at trial, either in person or by deposition.

III. FINDINGS OF FACT

A. Stipulations of Fact

1. Defendants have stipulated that on March 31, 2004, the ISLA AZTECA allided with the TOTONACA, causing damage to the TOTONACA's leg and raw water tower and resulting in loss of use of the TOTNACA during the period of repairs.

B. Ownership of the TOTONACA

2. Defendants have represented to the Predecessor Court, this Court, and the Fifth Circuit on numerous occasions in motions, briefing, and at hearings, that Plaintiff PMM is the owner of the TOTONACA. Defendants did not challenge PMM's ownership of the TOTONACA until May 6, 2008, the second day of the Bench Trial.

3. Plaintiffs alleged that PMM was the owner of the TOTONACA in their Amended Complaint filed May 31, 2006. (*See* First Am. Compl., Doc. No. 61, ¶ 11.) Defendants did not file an amended answer, and did not specifically deny the allegation that PMM owned the TOTONACA in any responsive pleading.

4. Defendants urged the Predecessor Court in June 2006 to deny Plaintiffs' Motion to File Amended Complaint, arguing that "[t]here is no question that PMM has been the true

owner of the TOTONACA . . . ." (Doc. No. 50.)

5. Defendants asserted that the TOTONACA was "owned and operated by Perforaciones Maritimas Mexicanas" again in a Motion to Apply Mexican Law, a Motion for Summary Judgment, an Emergency Motion to Stay Pending Appeal, and a Request for Written Certification. (Doc. No. 63, 74, 76, 77; see *also* Doc. No. 198 (counsel's statement at a July 14, 2006 hearing).) Defendants again declared that it was "undisputed" that PMM was the "true owner of the Totonaca" in a Motion for Expedited Hearing and again in a Motion for Reconsideration (Doc. No. 85, 216.) In briefing, Defendants represented to the Fifth Circuit that PMM owned the TOTONACA "at all relevant times."

6. Defendants have repeatedly asked this Court, the Predecessor Court, and the Fifth Circuit to rely on the fact that PMM filed a criminal action in Mexico when considering (initially, on reconsideration, and on interlocutory appeal) whether to dismiss the case for lack of subject matter jurisdiction, on principles of international comity, or on grounds of *forum non conveniens*. Defendants also asked these courts to consider the fact that PMM was named in an Ex Parte Declaratory Judgment Proceeding to limit liability in Mexico and was allegedly able to seek civil damages in the limitations action in reaching a decision on those Motions. (*See, e.g.*, Doc. No. 53, Affidavit of

Dr. Melo; Doc. No. 74, Affidavit of Dr. Melo; Defendants' Brief to Fifth Circuit; Doc. No. 113 at 9; Doc. No. 216.)

7. Counsel for Defendants MarMex and Grupo TMM, on behalf of former Defendant Seacor, also argued in a Motion to Dismiss before the Predecessor Court that PMM was the actual owner of the TOTONACA, and the Predecessor Court accepted that fact in its Order on Defendant Seacor's Motion to Dismiss. (Doc. No. 50 at 4 ("PMM was the actual owner of the TOTONACA").) The Predecessor Court also relied on Defendants' representations that PMM was the actual owner of the TOTONACA when granting Plaintiffs' request to amend its Complaint to add PMM as a Plaintiff.

8. The Fifth Circuit stated in its Order denying interlocutory appeal that "'The TOTONACA was owned by Perforaciones Maritimas Mexicanas, S.A. de C.V. ('PMM')." (Doc. No. 115.)

9. This Court accepted the fact that PMM was the owner of the TOTONACA in its Order denying Defendants' Motion for Reconsideration. (Doc. No. 230 ("It remains undisputed that Perforaciones Mexicanas Maritimas, the owner of the TOTONACA . . . [was] incorporated in Mexico.").)

10. Defendants did not argue that PMM was not the owner of the TOTONACA or that PMM did not have a proprietary interest in the

TOTONACA until the second day of a bench trial, after this Court had bifurcated the trial and Plaintiffs had withdrawn a number of exhibits including invoices reflecting that PMM had paid the costs of repairs.

11. Based on Defendant's repeated representations that PMM is the owner of the TOTONACA and Defendant's failure to deny PMM's ownership of the rig as alleged in the Amended Complaint, the Court finds that Defendants are judicially estopped from now claiming that PMM was not the owner of the TOTONACA.

C. Description of the TOTONACA

12. The TOTONACA is a self-elevating Mobile Offshore Drilling Unit. It measures approximately 53 meters in length and width. It is triangular in form, with three legs, independently operated, located on the forward, port, and starboard corners of the hull that are of lattice tubular high resistance steel construction. The tubing and and/or bracings of each leg is also made of high resistance steel. The legs of the TOTONACA are transparent and designed to minimize wind and wave forces. The bracings on the leg of the TOTONACA tie the leg together, and are part of the overall structure that allows the rig to stand up.

13. The TOTONACA has a raw water tower, located below the deck to the port side and a bit aft of the bowleg. The raw water tower is

made of steel, and is a structure that is not designed to flex. The raw water tower does not provide structural support to the rig.

14. The bottom of each of the TOTONACA's three legs is fitted with a spud can. The spud cans are welded to the leg. The spud cans act as a ballast to keep the platform steady. The spud cans are a tank, with a manhole to access the interior of the tank, measuring approximately nine meters in diameter.

15. In order to move the TOTONACA to and from different locations, either a heavy lift submersible or towing vessel must be utilized. With the self-elevating system, the TOTONACA is able, once floated into position, to lower the legs to the sea floor. The spud cans on the bottom of the leg penetrate the seafloor. The legs penetrate until the ground reaction causes the penetration to stop. As the legs penetrate the soil, the soil moves, flows in a semicircle around the spud can, fluffs up to the side and on top of the spud can, becoming 'disturbed' soil. The soil becomes disturbed because it has lost its strength as a result of the insertion of the spud can. When the legs have reached their maximum penetration, the jacking systems continue to move in the same direction, but now lifting the hull out of the water.

16. At the time of the allision, the height of the bottom of the upper hull above the surface of the water was 50 feet.

17. When the rig is ready to move locations, the barge engineer or captain calculates the expected draft of the rig and the expected center of gravity, so that it will float level. The rig is then jacked down to the calculated level, and jetting hoses are hooked up. The jetting hoses pump sea water down to the nozzles on the lower and upper surface of the spud can. The purpose of the lower surface nozzles is to break the suction of the soil with the can. The nozzles on the upper can wash off or "fluff up" any soil that is on top of the can. At that point, the legs are raised. If the legs do not pop free at that point, the barge engineer pulls the rig one foot below the equilibrium draft which results in one foot of buoyancy pulling up on the legs. The legs are then pulled up with a gentle lift.

D. March 31, 2004 Allision

18. On March 31, 2004, the TOTONACA was positioned in the Bay of Campeche, located in what is known as the Exclusive Economic Zone of Mexico. The TOTONACA was jacked up and was engaged in drilling operations at well Sinan 156 pursuant to a contract between PMM and Pemex. The TOTONACA had been at that site since May 2003.

19. On March 31, 2004, Mr. Juan Manuel Orta Flores was the Chief Mate onboard the ISLA AZTECA. After leaving the PRIDE OF TEXAS, Mr. Flores put the ISLA AZTECA on autopilot, increased the speed, and continued at the increased speed until the

ISLA AZTECA was less than a mile away from the TOTONACA.

20. Mr. Flores does not know the exact speed the ISLA AZTECA reached after he increased the speed. Mr. Flores then decreased speed to approximately 3 knots. When the ISLA AZTECA was approximately 0.3 miles away from the TOTONACA, Mr. Flores attempted to switch from autopilot to manual control, but was unsuccessful.

21. As a result of Mr. Flores' failure to control the course and speed of the ISLA AZTECA, the bow of the ISLA AZTECA forcefully allided with the bow leg and the raw water tower of the TOTONACA. The ISLA AZTECA first struck the TOTONACAYs raw water tower, and then made direct impact with the bracings of Leg Number One. Although the exact speed of the ISLA AZTECA at the time of the allision is unknown, testimony from Mr. Flores and from Plaintiffs expert Kevin Highfield[5] indicates that ISLA AZTECA, a 1600 ton vessel, was likely traveling at approximately 3 knots when it hit the TOTONACA. The ISLA AZTECA did not follow typical procedures when approaching the

[5] Kevin Highfield is a master mariner who has been involved in many damage surveys and has investigated many allisions. He personally observed damage to the TOTONACA and estimated the speed at which the ISLA AZTECA was traveling when it allided with the TOTONACA. He was designated by Plaintiffs as an expert in navigation and vessel management issues.

TOTONACA; for example, it did not stop at a distance, reduce its speed, change its position, or approach the rig stern side.

22. It is undisputed that the TOTONACA could not navigate the rig to avoid the allision because it was fixed to the sea bed.

23. At the time of the allision, the TOTONACA was properly lit. On March 31, 2004, the TOTONACA met all the classification and governmental requirements.

24. The impact of the allision was strong enough to seriously damage both the ISLA AZTECA and the TOTONACA.

E. Cracks in the Spud Cans

25. In 2000, prior to the allision, cracks were discovered in the TOTONACA spud can to leg connections. These cracks were repaired, and a company certified by the Lloyd's Register performed non-destructive tests on the welds to verify the welds.

26. There is no evidence in the record explaining what caused the cracks in the spud can to leg connections of the TOTONACA in 2000. There has been no allegation that the TOTONACA was involved in an allision or other accident that led to the cracks that were discovered in 2000.

27. In 2004, after the allision, cracks were again discovered in the spud to leg can connections of the TOTONACA.

28. Plaintiffs expert, Jacob Alford, is a Project Manager employed by Bennett & Associates. He is a specialist in the operation and repair of jack-up drilling units.

29. Mr. Alford was hired to act as a consultant in devising a scheme for the recovery, lowering and repair of the TOTONACA forward leg. He was not specifically hired to consult on repairs to the spud cans or methods to repair the spud cans of the TOTONACA.

30. Mr. Alford has looked at spud can to leg cracks about five times over the past 30 years, but has not repaired them himself. Mr. Alford has never been called upon to determine the cause of cracks in spud cans.

31. Mr. Alford did not directly inspect the spud can to leg connections of the TOTONACA. Mr. Alford did review a Safetech Marine Services report on the cracks discovered in the spud cans in 2000 and an inspection report prepared by Beacon Maritime identifying the cracks to the spud can to leg connections discovered in 2004.

32. After reviewing information about the damage on the topside of the TOTONACA, Mr. Alford was concerned about damage to the spud can to leg connections of the rig.

33. As Mr. Alford testified, some of the cracks discovered in 2004 were at the same location as the 2000 cracks, but the lengths of the cracks discovered in 2004 were different from the length of the cracks discovered in 2000. Some of the cracks discovered after the allision were not in the same location as the cracks that appeared in 2000. For example, on Leg 1, there were no cracks in the "C cord" in 2000, but cracks were discovered in the "C cord" in 2004. Also, there were no cracks discovered in Leg 3 in 2000, but two cracks were discovered in Leg 3 in 2004.

34. There are several possible reasons that cracks might appear in a vessel's spud can to leg connection.

35. Both Plaintiffs' and Defendants' witnesses agree that a considerable force imparted to a three-legged jack-up rig at the leg and raw water tower could cause cracks to spud can to leg connections.

36. Mr. Alford testified, for example, that when a considerable force is applied at the top of the leg, a bottom force would also have been applied to the leg to can connection. The Court did not allow Mr. Alford to testify as to whether the force of the March 31, 2004 allision actually caused the alleged cracks in the TOTONACA spud can to leg connections, because Mr. Alford admitted that he could only speculate as to the possible causes of cracks.

37. Although Defendants' expert Carey Akin agreed that an allision could cause a fracture in a spud can of a three-legged jack-up rig if enough strength is taken away from one leg, he could not say if the March 31, 2004 allision actually caused the cracks in the TOTONACA spud can to leg connections.

38. Spud can cracking can be caused by fatigue caused by environmental forces. Studies show that rigs in the North Sea may be prone to this kind of fatigue cracking, but rigs located in the Bay of Campeche are not subject to as severe an environment as those in the North Sea.

39. If cracks to a spud can are repaired improperly, the prior welds could fail. The cracks discovered in 2000 were certified as fully repaired. Although improper welding procedures could not have caused all of the cracks discovered in 2004, it is at least possible that some of the cracks discovered after 2004 could have been caused by failed welds.

40. Mr. Luis Elorza Cinta, the project manager in charge of repairs to the TOTONACA designated by Plaintiffs as having expert knowledge in repairs and costs, testified that spud can cracks can occur from pulling the spud cans out of the sea bed. Mr. Elorza Cinta did testify, however, that he did not have expert knowledge of that fact. Mr. Alford testified that although the jetting process may loosen the soil that is sitting on

top of the spud cans, it does not always remove all of the soil. If the jetting process is not enough to lift the spud cans, buoyancy is required to pop the legs out of the sea floor.

41. Months after the allision, the spud cans were pulled out of the sea bed and taken to port to for inspection. According to Mr. Elorza Cinta, legs were probably reinserted in the mud at port and later pulled back out again.

42. Defendant's expert, Gregg Perkin, is a registered professional engineer in Texas and twelve other states, and holds a degree in mechanical engineering. Mr. Perkin owns Engineering Partners International and EPI Materials Testing Group, which are, respectively, a laboratory and a mechanical testing and metallurgical laboratory.

43. Mr. Perkin has not personally inspected cracks in spud can connections nor has he been involved in the design or repair of spud cans. Mr. Perkin could not say what caused the cracks in the spud can to leg connectors of the TOTONACA that were discovered in 2004.

44. Mr. Alford and Mr. Perkin agreed that destructive testing could have determined the cause of the cracks to the spud can to leg connections or at least could have helped determine the cause of the cracks. Such testing requires a six inch piece of steel to be cut out of the leg to can connection.

Destructive testing was not conducted to determine the cause of the TOTONACA spud can to leg connection cracks.

IV. CONCLUSIONS OF LAW

A. Judicial Estoppel

1. "Judicial estoppel is 'a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position'." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999)(citing *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)). "The purpose of the doctrine is 'to protect the integrity of the judicial process,' by 'prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.'" *Id.* The Supreme Court has observed that courts also consider "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped" when deciding whether to apply the doctrine of judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). The doctrine is generally only applied where the position is clearly inconsistent with a party's previous position and where the party convinced the court to accept the previous position. *In re Costal Plains*, 179 F.3d at 206. Judicial acceptance "means only that the . . . court has adopted the position urged by the party, either as a preliminary matter or as part of a final

disposition." *Id.* (citing; *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988)). The Fifth Circuit "has indicated that the doctrine applies to more than just sworn statements of a party and likewise has never specifically stated that it applies only to a party's sworn statements." *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (applying judicial estoppel to statements made by a party's attorney to the court in pleadings, motions, responses to motions, and at the pretrial hearing). The doctrine of judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *New Hampshire*, 532 U. S. at 751.

2. The Court finds that Defendants are judicially estopped from asserting that PMh4 is not the owner or has no adequate proprietary interest in the TOTONACA based on their multiple prior representations that PMM is, in fact, the owner of the rig.[6] This position is entirely inconsistent with Defendants' prior position, i.e. that PMM

[6] Defendants have not addressed Plaintiffs' argument that the holding of *Robbins Dry Dock* is entirely inapposite, because its holding is substantive law, and this Court is applying Mexican substantive law (at the urging of Defendants). *See, e.g., Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 307-10 (1927); *State of La. ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1022-23 (5th Cir. 1985). Neither party has attempted to brief the Court on what interest a Plaintiff must have under Mexican law in order to maintain a lawsuit such as this one.

was the true owner of the TOTONACA.[7] The Predecessor Court and this Court adopted that argument in prior Orders and relied on this repeated representation when issuing rulings on Defendants' Motion to Dismiss and Motion for Reconsideration. Furthermore, Defendants' extremely tardy change of position would impose a serious detriment to Plaintiffs, and to this and the Predecessor Court.

B. Jurisdiction and Relevant Mexican Law

3. The Court has jurisdiction over the parties and this matter pursuant to its admiralty and general maritime jurisdiction under 28 U.S.C. § 1333 and Federal Rule of Civil Procedure

4. Article 1913 of the Mexican Civil Code governs this case. Article 1913 provides: "If a person employs mechanisms, instruments, equipment or substances which are inherently dangerous, because of the speed

[7] It is not entirely clear whether the representation that PMM filed a criminal complaint in Mexico and was named in the limitation action is clearly inconsistent with the party's current allegation that PMM is not the owner of the TOTONACA. This Court is not fully briefed as to whether PMM would have to have a proprietary interest in the TOTONACA of the sort defined by *Robbins Dry Dock* and its progeny to seek damages in the limitation action. Defendants' multiple representations that PMM has at all relevant times been the true owner of the TOTONACA, however, is clearly inconsistent with Defendants' current position that Plaintiffs have not proven that PMM has a proprietary interest in the ru

they develop, their explosive nature or inflammable characteristics, or by the intensity of the electric current, or similar causes, he/she is liable for the damages or injuries they caused even though he/she is using them illicitly, unless he can prove that the damage was caused by the fault or inexcusable negligence of the victim."

5 The elements of a cause of action under Article 1913 are, therefore: 1) "Use" by the defendant of a substance or thing; 2) "Dangerousness" of the substance or thing; 3) "Damages"; and 4) "Causal relationship" between the defendant and the damage. See Woodfin L. Butte, *Strict Liability in Mexico*, 18 AM. J. COMP. L. 805, 816 (1970).

6 Defendants have stipulated that the ISLA AZTECA was a "dangerous instrument" and that MarMex was a "user" of that dangerous instrument.

7 Defendants have stipulated that the March 31, 2004 allision caused damages to the TOTONACA, but deny that the allision caused the cracks in the spud can to leg connections.

1. Liability of Defendant MarMex.

8 The Court finds that Plaintiffs have proven that the Defendant MarMex is liable under Article 1913, i.e., MarMex was a user of a dangerous instrument (the ISLA AZTECA) and caused damage to the TOTONACA. As

the Court will discuss further, infra, MarMex is not liable, however, for damage to the TOTONACA spud cans.

2. Liability of Defendant Grupo TMM and Definition of "User" Under Article 1913

9. The Court finds that Defendant Grupo TMM is not liable for damages caused by the allision under Article 1913. Grupo TMM cannot be considered a "user" of the ISLA AZTECA under Mexican law, nor is there evidence to support piercing of the corporate veil under United States law.

10. Plaintiffs allege that Defendant Grupo TMM owns 60 percent of MarMex and exercised substantial corporate control over MarMex by providing managers for MarMex and services for MarMex's strategic planning and day-to-day operations including legal, treasury, tax, accounting, operations, human resources, budget, and insurance services.[8]

11. Mexico is governed by a civil law system. The Fifth Circuit has discussed the application of law in a civil law system, explaining "The primary source of law is

[8] Although Defendants previously represented to the Predecessor Court and this Court that Grupo TMM owned 60 percent of MarMex in response to interrogatories, affidavits, and in motions, they now claim that Transportes Maritimas Mexicanas, a wholly owned subsidiary of Grupo TMM, was the 60 percent shareholder of MarMex in 2004

legislation, not judicial decision–as is true in common law systems. In practical terms, civilian jurists must turn first to enacted statutes as superior sources of law. Only when no legislation controls an issue are lawyers and judges entitled to look elsewhere for solutions to legal problems. Judicial decisions as a class are merely persuasive authority to be used only when neither legislation nor custom provide a rule of decision. Stare decisis as it is known in common law is rejected by the civil law tradition. Judicial decisions are law only to the extent they either fill in the gaps left by legislation and custom or establish custom." *Henry v. SIS Bermuda Star*, 863 F.2d 1225, 1230-31 (5th Cir. 1989); *see also Curley v. AMR Corp.*, 153 F.3d 5, 14 (2d Cir. 1998) ("Mexican law is much different, and its sources do not lie in precedent cases. As a civil law jurisdiction, Mexican courts consider the text of the constitution, civil code and statutory provisions as the primary source of law and give them preponderant consideration."). Some case law in Mexico does have precedential value, however. *See, e.g.*, Carlos R. Soltero & Amy Clark-Meachum, *The Common Law of Mexican Law in Texas Courts*, 26 HOUSTON J. INT'L L. 119, 137 (2003) ("In Mexico, case law has precedential value only if it is *jurisprudencia obligatoria* or *jurisprudencia definida*, which means that the Mexican Supreme Court has considered and decided the same issue five consecutive times in the same way."); Testimony of Dr. Melo, Doc. No.

289, Ex. 5 ("In order for case law to become binding authority in Mexico . . . there must be five cases on point with a better than 3-2 vote in support of the opinion rendered in the case."); STEPHEN ZAMORA ET AL., MEXICAN LAW 85 (Oxford 2005) (explaining the difference between *jurisprudencia obligatoria* and 'isolated' rulings or *tesis aisladas*). Furthermore, "Mexican judges often follow prior rulings of other courts and judges voluntarily, not because Mexican law or legal doctrine mandates that they do so but because doing so serves other purposes." ZAMORA, *supra*, at 83.

12. Article 1913 does not clarify exactly which defendants can be considered to have "used" a dangerous instrumentality. The Fifth Circuit has acknowledged that "'Under Mexico's strict liability, the defendant is normally the user (whether owner, agent or bailee) of an inherently dangerous mechanism, instrument, apparatus or substance who, with his use, injures the plaintiff" (citing *Symposium, Part Five: A Serious Accident Occurs in the Mexican Plant: Problems of Corporate and Product Liability*, 4 U.S.-MEX. L.J. 125, 128 (1996)).

13. The Court is aware of no other Mexican statutory provision or case that specifically addresses the question of whether a company that is a majority shareholder of another company can be held liable for damage caused by the subsidiary under Article 1913.

14. Plaintiffs' Mexican law expert, Dr. Jose David Enriquez Rosas, testified that Article 1913 reaches a "commercial user" of a dangerous instrument. According to Dr. Enriquez, the purpose of Article 1913 "was to protect consumers from abuses by the corporations whilst the development of the Mexican industry was taking place. Thus, the way to prevent circumventions to the spirit of article 1913 was-and is now to have a wide interpretation of the term 'user,' not only in connection with the operation itself, but also to the economic gain of said operation." (Doc. No. 241, Ex. 1, at 4.)

15. Dr. Enriquez further contends that where a company exercises economic or corporate control over another company, it may be considered a "commercial user" for purposes of Article 1913. (*Id.*) Dr. Enriquez has not specifically defined "corporate control." According to Dr. Enriquez, "economic control occurs, *inter alia*, when a company obtains all or most profits from another company." (*Id.*) Dr. Enriquez concludes that "[a] different view would simply create an incentive for economic groups to sophisticate their corporate organizations in order to evade their responsibility." (*Id.*) Dr. Enriquez testified that a company that receives over 50 percent of the profits of another entity could be considered to exercise such economic control over another company, but did not cite to any code provision or case law in support of this theory.

16. Dr. Enriquez insists that the liability of a "commercial user" under Article 1913 has "nothing to do with the application of any doctrine regarding the piercing of the corporate veil. In the 'commercial user' test, one does not need to analyze the subsidiary-holding corporate structure in detail, but simply to establish the economic benefit–contractually or by any other means–by the 'commercial user' in connection with the 'technical user.'" (Doc. 283, Ex. A, p. 3.)

17. Plaintiffs and Dr. Enriquez have pointed to three Mexican Supreme Court cases in support of their "commercial user" theory. None of the cases cited is considered precedential in Mexico.

18. In *Núñez de Quintana Maria*, the Mexican Supreme Court noted: "It is fair, under the law, that whoever, for his own personal benefit or profit creates a risk towards others, is responsible for that damage." No. 3855389, Arnparo Civil Directo 1335/44, Apr. 13, 1953 (unanimously passed with four votes).

19. In *Soledad Pérez*, the Mexican Supreme Court held an electric company liable for damage to a victim who had not herself contracted with the electric company, but instead was injured on the property of the individual who contracted with the company. No. 339163, Amparo Directo 4052/54, July 20, 1956 (3-2 vote). The court held that, in

addition to the property owner, the electric company could be held liable because it produced the electricity that caused the harm. The court noted that, because the electricity itself is always linked to the damage caused, he who exploits or utilizes the energy (i.e., the electric company) is liable for the damage caused by that energy.

20. Finally, in *Cia. Mexicana de Luz y Fuerza Motriz, S.A.*, the Mexican Supreme Court noted: "Whoever uses [a dangerous] apparatus is liable for the damages caused by same . . . . This is based on the fact that such person (the one using [the dangerous] apparatus), who should have been reaping the benefits of such use, or otherwise would not have used it, is socially in the position of ensuring against any dangerous consequences arising from such use. No. 3388738, Amparo Directo 263/55, Apr. 24, 1957 (unanimously passed with five votes, Reporting Judge Gabriel Garcia Rojas). The court added that liability under Article 1913 extends not only to the person who directly or personally uses the dangerous instrument, but also to the owners of such instruments.

21. In 1970, Dr. Woodfin Butte published an article on strict liability in Mexico, discussing Article 1913 and related case law in detail. Woodfin L. Butte, Strict Liability in Mexico, 18 AM. J. COMP. L. 805, 816 (1970). Although Dr. Butte's article discusses "what constitutes 'use'" and "what

constitutes use 'by the defendant'" under Article 1913, the cases discussed in the article shed no light on the precise question at issue in this case. *Id.* at 816-19.

22. Defendant's Mexican Law Expert, Dr. Ignacio Melo, vigorously contests Dr. Enriquez's interpretation of Article 1913. According to Dr. Melo, "Article 1913 is not a wide concept and therefore it does not apply to shareholders, nor other persons or corporations, notwithstanding the destiny of its profits . . . ." (Doc. 243, Ex. 1, ¶ 12.) Dr. Melo also insists that Dr. Enriquez's interpretation, taken to an extreme, might allow liability to attach to a wide range of actors that stand to benefit indirectly from the use of a dangerous instrument.

23. Defendants insist that MarMex alone is more than adequately insured to cover any and all alleged damage claimed by Plaintiffs in this case, and Plaintiffs have presented no evidence or argument to the contrary.

24. The relevant Mexican case law provided to this court is not directly on point, and does not clarify whether a parent company that owns a majority of shares in a company can be held liable for the subsidiary's use of a dangerous instrument.

25. The doctrine of piercing the corporate veil exists in Mexico, though it is rarely used. *See, e.g.*, Humberto Gayou & Robert G. Gilbert, *Legal Building Blocks for*

Structuring Sales in the Mexican Market, 25 ST. MARY'S L.J. 1115, 1136 (1994) ("Piercing the corporate veil in Mexico is much more difficult than in the United States."), *Product Liability Claims on Both Sides of the Border: A Panel Discussion*, 8 U.S.-MEX. L. J. 123 (2000) ("The veil piercing doctrine is mostly unknown in Mexico. . . .") (panelist Carlos Loperena); Carlos Obregon & Federico Santacruz, *Private Equity*, LATIN LAWYER, Feb. 1, 2008, *available at* http://www.latinlawyer.com/article.php?id=13155 ("Except for very limited circumstances, neither Mexican law nor any judicial interpretation issued thereunder provide for the application of the 'piercing the corporate veil' theory. The main exceptions where shareholders may become liable for a company's obligations are in respect of 'irregular' companies . . . and in connection with tax liabilities of the company . . . ."); Juan Francisco Torres Landa & Mario Jorge Yanez, *Mexico* in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO ENVIRONMENT LAW 2006 (Global Legal Group 2006) ("Mexico has a very limited application of the doctrine of 'piercing the corporate veil'. . . .").[9]

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[9] In 2003, two Mexican senators submitted a draft bill for a decree to enact a Federal Law for Piercing the Corporate Veil. *See* Omar Guerrero R., Bernardo Ledesma U., & Juan Francisco Torres Landa, S.C., *Piercing the Corporate Veil in Mexico*, 26 COMP. L. YEARBOOK OF INT'L BUS. 375, 376 (2004) (noting also that "Mexican law relies excessively on form and the legal separation between shareholders and legal entities, thus allowing the abuse of

26. Plaintiffs' expert, Dr. Enriquez, insists that the veil piercing doctrine is not at all relevant to the question of whether Grupo TMM should be considered a "user" under Article 1913. (Doc. No. 283, Ex. A, at 3.) Dr. Enriquez is quite familiar with the doctrine of veil piercing. In 2001, he published a book on piercing the corporate veil that included a chapter on the reception of the doctrine in Mexican law.[10] *See* JOSE DAVID ENRIQUEZ ROSAS, LA PERSONALIDAD JURIDICA SOCIETARIA (Oxford 2001). The Court presumes that if veil piercing were appropriate under Mexican law in this case, Plaintiffs and Dr. Enriquez would have made such an argument.[11]

27. To the extent the Court is able to interpret and apply Mexican law on this point, the

corporations and the independence from their members to isolate legal liabilities. . . .") It is not clear whether this proposed bill became law. A 2006 article by one of the same authors (Juan Francisco Torres Landa) and a 2008 article describing the very limited use of the veil piercing theory in Mexico suggest that it did not. *See* Juan Francisco Torres Landa & Mario Jorge Yañez, *Mexico* in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO ENVIRONMENT LAW 2006 (Global Legal Group 2006); Carlos Obregón & Federico Santacruz, *Private Equity*, LATIN LAWYER, Feb. 1, 2008.

[10] Neither party brought this book to the Court's attention. The Court identified the book as part of its own research into foreign law, as permitted under FED. R. CIV. P. 44.1.

[11] Defendants' expert, Dr. Melo, has not addressed the question of veil piercing under Mexican law in his affidavits.

Court is persuaded by Defendant's argument that the question of whether liability extends to Grupo TMM is actually a question of veil piercing. Plaintiffs' policy argument as to why liability should extend beyond the owner of the vessel is rooted in a concern that entities might seek to avoid responsibility through sophisticated, and presumably improper, structuring of the corporate form. This concern is precisely what the doctrine of piercing the corporate veil purports to address.

28. The court finds no support in Mexican case law, code provisions, or the writings of experts for the proposition that a parent company with a majority interest in a subsidiary can be held strictly liable as a "commercial user" under Article 1913. Nor is the court persuaded by Dr. Enriquez' policy arguments regarding the purpose of Article 1913. Even assuming the facts alleged by Plaintiffs regarding the relationship between MarMex and Grupo TMM to be true, the Court finds that Grupo TMM is not a "user" under Article 1913 as a matter of law.

29. The Court additionally notes that "[w]hen the parties have failed to conclusively establish foreign law, a court is entitled to look to its own forum's law in order to fill in any gaps." *Banco de Credito Indus., S.A. v. Tesoreria General*, 990 F.2d 827, 836 (5th Cir. 1993); *see also In re Avantel, S.A.*, 343 F.3d 311, 322 (5th Cir. 2003) (upholding district court's decision to apply Texas law

instead of Mexican law where the Plaintiff failed to conclusively establish foreign law). The parties have failed conclusively to establish whether a parent company that owns 60 percent of a subsidiary may be considered a "user" under Article 1913. The Court therefore applies the law of the forum to determine whether a parent company may be held liable for the actions of its subsidiary. The relevant forum law in this case pertains to the piercing of the corporate veil.

30. The Fifth Circuit has found that the federal and Texas alter ego doctrines overlap, and has cited state and federal cases interchangeably when discussing veil piercing in the admiralty context. *See U.S. v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 690 n. 6 (5th Cir. 1985).

31. "Generally, a court will not disregard the corporate fiction and hold a corporation liable for the obligations of its subsidiary except where it appears the corporate entity of the subsidiary is being used as a sham to perpetrate a fraud, to avoid liability, to avoid the effect of a statute, or in other exceptional circumstances." *Lucas v. Texas Industries, Inc.*, 696 S.W.2d 372, 374 (Tex. 1984). In *Talen's Landing*, the Fifth Circuit observed: "It is clear that Admiralty Courts can pierce the corporate veil of a corporation in order to reach the 'alter egos' of the corporate defendant directly involved. This is especially true where the near identity of

two corporations should be disregarded in order to prevent manifest injustice to third parties, or where the separate identity of two corporations should be disregarded where one corporation becomes the conduit of another." *Talen's Landing, Inc. v. M/V Venture, II*, 656 F.2d 1 157, 1 160 (5th Cir. 198 l)(internal citations omitted)

32. Again, even presuming Plaintiffs' version of the facts to be true, the Court finds that the facts of this case do not justify piercing the corporate veil so that Grupo TMM may be held liable for the tort of its subsidiary. The alleged facts do not suggest that Plaintiffs have "fallen victim to a basically unfair device by which a corporate entity has been used to achieve an inequitable result." *See, e.g., Lucas v. Texas Industries, Inc.*, 696 S.W.2d 372, 375 (Tex. 1984); *see also Lubrizol Corp. v. Cardinal Const. Co.*, 868 F.2d 767, 771 (5th Cir. 1989) ("[I]t is clear that Texas courts simply refuse to find liability without wrong-doing by the controlling corporation.") Furthermore, the Texas courts have noted that "If the corporation responsible for the plaintiffs injury is capable of paying a judgment upon proof of liability, then no reason would exist to attempt to pierce the corporate veil and have shareholders pay for the injury." Id. Plaintiffs have made no allegation that MarMex is unable to pay a judgment upon proof of liability. Nor does the Court believe that holding Grupo TMM is necessary "to prevent manifest injustice" to Plaintiffs. *See*

Talen's Landing, 656 F.2d at 1160 (internal citations omitted).

33. Therefore, because Mexican law does not support the theory that Article 1913 may impose liability on a "corporate user" and because veil piercing is inappropriate under forum state law, Grupo TMM is not liable for the tort of its subsidiary, MarMex.

C. Causation of Damages to Spud Cans

34. Plaintiffs insist that Mexican law only requires the Court to find that they have proven the elements of their case by a preponderance or "more likely than not" standard of proof Defendants insist that the Court must find that Plaintiffs' proved each element "fully" or "beyond a reasonable doubt."

35. It is not immediately clear what standard of proof a Mexican court would apply in a civil case.

36. The Court need not decide this challenging question, however, because it finds that Plaintiff has not proven, even by a preponderance of the evidence, that the cracks discovered in the spud cans were caused by the force of the allision. Although Plaintiffs have shown that cracks in a spud can to leg connection could be caused by an allision, there is simply not sufficient evidence to establish that the particular cracks discovered in the TOTONACA spud

to leg can connections in 2004 were actually caused by the March 31, 2004 allision. An allision is not the only possible cause of the cracks discovered in 2004. Cracks were discovered in the TOTONACA7s spud cans in 2000, and there is no allegation that those cracks were caused by an allision. The Court understands that destructive testing is not required by the classification society, but it certainly would have aided Plaintiffs in proving the cause of the damage to the TOTONACA spud cans in litigation. Furthermore, Plaintiffs failed to produce an expert qualified to testify as to the possible causes of the spud can cracks. The Court therefore finds that Defendant MarMex is not liable for the cracks discovered in the TOTONACA's spud can to leg connections under Article 1913.

IV. CONCLUSION

For the reasons stated above, **JUDGMENT IS ENTERED** for Defendant Grupo TMM on all of Plaintiffs' claims. **JUDGMENT IS ENTERED** against Defendant MarMex on Plaintiffs' claims under Article 1913. In the next phase of this trial, the Court will adjudicate the extent of the damages to the TOTONACA including damages to the leg and raw water tower and the damages incurred for loss of hire.[12] Defendant MarMex is not liable under Article

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[12] Defendants have indicated to the Court that they will likely appeal this Order to the Fifth Circuit prior to the damages trial. It appears that such an appeal would be permitted under 28

1913, however, for damages related to the cracks in the TOTONACA spud can to leg connections.

IT IS SO ORDERED.

SIGNED this 2nd day of September, 2008.

/s/Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

U.S.C. § 1292(a)(3), which grants the Court of Appeals jurisdiction over "Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." To the extent that appeal of this Order is not allowed under 28 U.S.C. § 1292(a)(3), this Court would certify the Order for interlocutory appeal pursuant to 28 U.S.C. §1292(b).

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:05-cv-419
(ADMIRALTY)

[Filed March 24, 2008]

PERFORACIONES MARITIMAS MEXICANAS S.A. de C.V. and CERTAIN REINSURING UNDERWRITERS SUBSCRIBING TO REINSURANCE CONTRACT NO. AHE-030044 AS AMENDED TO NO. AHE-04004,	)
Plaintiffs,	)
v.	)
SEACOR HOLDINGS, INC., GRUPO TMM S.A. de C.V., and MARITIMA MEXICANA S.A. de C.V.,	)
Defendants.	)

MEMORANDUM AND ORDER

Pending before the Court is Defendants' Motion for Reconsideration pursuant to Federal Rule of Civil

Procedure 54(b). Defendants ask the Court to reconsider a July 21, 2006 Order on Defendant's Motion to Dismiss, Docket No. 67. After consideration of the parties' arguments and the relevant law, the Court finds that Defendants' Motion, Docket No. 197, should be **DENIED**.

I. BACKGROUND

This case involves an allision between Defendants' Mexican flagged supply vessel, the ISLA AZTECA, and Plaintiffs' Mobile Offshore Drilling Unit TOTONACA, another Mexican flagged vessel. The allision occurred on March 31, 2004 in Mexico's Bay of Campeche. Although Defendants' motion suggests that location of the allision was within the "territorial waters" of Mexico, Defendants clarify that it actually took place within Mexico's exclusive economic zone. *See* discussion *infra* Part II.A. It remains undisputed that both Plaintiff Perforaciones Maritimas Mexicanas,[1] the owner of the TOTONACA, and Defendant Maritima

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[1] PMM's underwriters are also Plaintiffs in this lawsuit. PMM stresses that its lead underwriter, Navigators Insurance Services of Texas, Inc., is a Texas corporation with its principle place of business in Houston, Texas. (Pls.' Resp. 3.) Defendants note that a subrogated underwriter steps into the shoes of its insured.

Mexicana (MarMex),[2] owner and operator of the ISLA AZTECA, were incorporated in Mexico.

On May 6, 2004, Defendant MarMex filed a petition to limit its liability in Mexico under the Convention on Limitation of Liability for Maritime Claims, and that limitation fund was established on October 27, 2004 in the amount of US$427,460.97. On May 17, 2004, Plaintiff PMM filed a criminal complaint known as a *Querella* in Mexico asking the Public Prosecutor to conduct a criminal investigation and issue an indictment against MarMex and the crew of the ISLA AZTECA. The Public Prosecutor did not find sufficient evidence of criminal conduct or criminal negligence, and declined to prosecute those charges. On July 28, 2005, Plaintiffs filed this lawsuit in the Galveston Division of the Southern District of Texas (the "Predecessor Court").

On July 21, 2006, the Predecessor Court denied Defendants' motion to dismiss on *forum non conveniens*, principles of international comity, and for lack of subject matter jurisdiction. In November 2006, the Fifth Circuit dismissed Defendants' interlocutory appeal of that Order, finding that the Order did not determine the parties' substantive rights and

[2] MarMex is 60% owned by a Mexican entity, Defendant Grupo TMM, and 40% owned by Seacor Holdings, Inc. or Seacor Marine Mexico, Inc. (SMII). At the time the original Order was entered, the parties disputed whether the stock is held by Seacor or by SMII. Recent deposition testimony indicates that MarMex has merged with TMM. (Pls.' Resp. 22 Plaintiffs.) Plaintiffs claim that Seacor exercised "significant operational control" over the ISLA AZTECA. (See Pls.' Response 23.) Plaintiffs' claims against Seacor were dismissed in July 2006.

liabilities. *See Perforaciones Exploración y Producción et al. v. Grupo TMM S.A. et al.*, No. 6-41228 (5th Cir. Nov. 30, 2006). The case was reassigned to this Court on October 26, 2007. Defendants filed the pending Motion for Reconsideration of the Predecessor Court's Order on January 7, 2008. The Court granted Plaintiffs' request for additional time to respond to the Motion, allowing them the opportunity to complete certain depositions that Plaintiffs argued might provide further evidence that Texas is a convenient forum for Defendants. The case is set for trial on April 7, 2008.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 54(b) allows the Court to reconsider "any order or other decision . . . that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the Parties." FED. R. CIV. P. 54(b); *see also Matagorda Ventures, Inc. v. Travelers Lloyds Ins. Co.*, 208 F. Supp. 2d 687, 688 (S.D. Tex. 2001). A motion to reconsider should "clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005) (citing *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)).

The doctrine of the law of the case and the principle of judicial comity are also relevant to the Court's reconsideration of an order issued by a predecessor judge. "[W]hen a district judge has rendered a decision in a case, and the case is later transferred to another judge, the successor should not ordinarily overrule the

earlier decision." *Loumar*, 698 F.2d at 762 (citing 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4478 (1981)). However, neither the law of the case doctrine nor the principle of judicial comity "is . . . a barrier to the correction of judicial error," *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983); *see also Gallimore v. Missouri Pac. R. Co.*, 635 F.2d 1165, 1172 (5th Cir. 1981) (noting that judicial comity "should give way, if the need should arise, to the interests of justice and economy when those interests would be flouted by rigid adherence to the rule"), and the Court retains discretionary authority to reconsider a predecessor judge's decision, *see Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-18 (1988) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'"); *Loumar*, 698 F.2d at 762 (noting a successor judge's "bountiful discretion" in reviewing a predecessor judge's work, but cautioning "A judge should hesitate to undo his own work. Still more should he hesitate to undo the work of another judge. But until final judgment or decree there is no lack of power, and occasionally the power may properly be exercised." (citing *Peterson v. Hopson*, 29 N.E.2d 140, 144 (Mass. 1940)); *Abshire v. Seacoast Products, Inc.*, 668 F. 2d 832, 837-38 (5th Cir. 1982) ("The successor judge has the same discretion as the first judge to reconsider the order.").

III. ANALYSIS

A. Subject Matter Jurisdiction

In the Order, the Predecessor Court denied Defendant's motion to dismiss for lack of subject matter jurisdiction. There is no clearly controlling precedent on this question, and the Predecessor Court did not commit a manifest error of law in finding that subject matter jurisdiction existed.

In addition to the arguments presented in their original Motion to Dismiss, Defendants now argue that the United Nations Convention on the Law of the Sea ("UNCLOS"), Dec. 10, 1982,, 21 I.L.M. 1245, 1833 U.N.T.S. 3., and the Treaty on Maritime Boundaries between the United Mexican States and the United States of America (Carribbean Sea and Pacific Ocean) May 4, 1978, 2143 U.N.T.S. 405 ("Treaty on Maritime Boundaries"), preclude the United States from exercising subject matter jurisdiction over this case. It does not appear, however, that either treaty confers exclusive jurisdiction on the Mexican courts over allisions occurring within its exclusive economic zone (EEZ).[3]

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[3] Plaintiffs are correct that the United States is a signatory to UNCLOS, but has not ratified the Convention. The United States has acknowledged that the provisions of UNCLOS regarding the exclusive economic zone are declarative of customary international law, however, *see Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 305 n.14 (1st Cir. 1999); RESTATEMENT (THIRD) OF FOR. REL. LAW § 514, cmt. a, Reporter's Note 1. Additionally, as a signatory to the Convention, the United States is generally "obliged to refrain from acts that would defeat the object and purpose of the agreement," *Mayaguezanos*, 198 F.3d

UNCLOS declares that coastal state have certain sovereign rights in the EEZ, which "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." UNCLOS, art. 57. Article 56 of UNCLOS sets forth those rights:

> In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention.

UNCLOS, art. 56. Non-coastal states retain certain rights in the exclusive economic zone, as well. UNCLOS art. 58 (stating that, in the EEZ, all states

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at 305 n. 14 (citing *Kreimerman v. Casa Veerkamp, S.A. de C. V.*, 22 F.3d 634, 638 n. 9 (5th Cir. 1994); RESTATEMENT (THIRD) OF FOR. REL. LAW, pt. III, introductory note, at 145). Because the Court finds that the relevant treaties do not preclude subject matter jurisdiction, it need not reach the question of whether the Defendants have standing to assert rights under either UNCLOS or the Treaty on Maritime Boundaries.

enjoy "the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention"). Nothing in the language of UNCLOS indicates that Mexico's limited sovereign rights related to the exploration and exploitation of natural resources in the EEZ deprives the United States courts of jurisdiction over torts or collisions that occur on those waters. *See also* RESTATEMENT (THIRD) OF FOR. REL. § 511, cmt. b (noting that the "'sovereign rights' which a coastal state enjoys in its exclusive economic zone . . . are functional in character, limited to specified activities.").[4]

The Treaty of Maritime Boundaries does not compel a different conclusion. The treaty states that: "North of the maritime boundaries established by Article I, the United Mexican States shall not, and south of said boundaries, the United States of America shall not, claim or exercise for any purpose sovereign rights or jurisdiction over the waters or seabed and subsoil." Treaty of Maritime Boundaries, art. II. The Treaty of Maritime Boundaries also notes that the treaty "shall not affect or prejudice the positions of either Party with respect to "sovereign rights or jurisdiction for any other purpose." Treaty of Maritime Boundaries, art. III. Again, this language does not

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[4] The Predecessor Court also heard expert testimony to this effect prior to entering the Order. (*See* Mot. Hearing, Tr. Apr. 27, 2007, p. 59-60.)

appear to directly address the United States courts' jurisdiction over an allision between vessels in that area.

Nor did the Predecessor Court commit a manifest error of law when determining that subject matter jurisdiction was appropriate based on relevant United States case law. The Supreme Court's statement in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971), that "the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring on the navigable waters of the United States" does appear to be *dicta*, and the Court's determination that the locality test set forth in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1999, only requires that the tort occur "on navigable waters" is not clearly erroneous.[5] Both the Supreme

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[5] The term "navigable waters of the United States" has been construed in some contexts to include the high seas. *See, e.g., Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264, 268 (5th Cir. 1986). At least prior to the creation of the concept of an EEZ, the high seas were considered to encompass "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." *Id.* (citing 1 BENEDICT ON ADMIRALTY § 141, at 9-2 (7th ed.)). The allision at issue in this case did not take place in Mexico's territorial sea, but instead in its exclusive economic zone. *Compare* UNCLOS, Part II, Sec. 2 (discussing the territorial sea) *with* UNCLOS, Part V (discussing the exclusive economic zone). Some circuits have discussed the EEZ and the high seas as separate areas. *See, e.g., Humane Soc'y of the United States v. Clinton*, 236 F.3d 1320, 1322 (Fed. Cir. 2001) There is also at least some reason to believe that the EEZ might properly be considered part of the high seas subject to the coastal state's limited sovereign rights, however. *See* RESTATEMENT (THIRD) OF FOR. REL. § 511, Reporter's Note 2 (acknowledging that UNCLOS did not expressly declare that the

Court and the Fifth Circuit have found that subject matter jurisdiction exists in cases involving collisions between two foreign vessels on the high seas, but that Courts may decline such jurisdiction on grounds such as *forum non conveniens*. *See, eg., Atlantic Transport Co. of W.Va. Imbrovek*, 234 U.S. 52, 60 (1914); *The Belgenland*, 114 U.S. 355 (1885); *Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv*, 711 F.2d 1231 (5th Cir. 1983); *see also* 1-VIII BENEDICT ON ADMIRALTY § 129 ("Admiralty courts have jurisdiction of admiralty suits entirely between foreigners when proper service can be had or property attached, but generally a court may, in its discretion, dismiss the case on grounds of forum non conveniens."); 1 THOMAS J. SCHOENBAUM ADMIRALTY & MAR. LAW § 14-9 (4th ed. 2004) (declaring that "[i]n the United States, collision jurisdiction potentially extends to the four corners of the globe, to the high seas and even foreign territorial waters," but noting that "the courts have adopted several ways of abstaining from exercising jurisdiction . . . in collision cases where justice requires"). At least one Circuit has found subject matter jurisdiction to exist where the tort occurred in the *territorial* waters of another nation, but that case involved an American plaintiff. *See Neely v. Club Med Management Services, Inc.*, 63 F.3d 166, 170 (3d Cir. 1995); *see also* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 33 (2d ed. 1975) ("Occurences on foreign

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EEZ remains part of the high seas, but noting that "the history of the negotiations indicates that they consider that the zone remains high seas, although it will be subject to exceptional rights in favor of the adjacent coastal state.") The allision at issue in this case could, therefore, at least plausibly be considered to have occurred within "the navigable waters of the United States."

navigable waters may also round admiralty jurisdiction.").

The Court is not aware of a case that addresses the precise fact scenario present in this case: namely, an *in personam* suit involving an allision between two vessels operating under the flag of the same country that occurred in that country's Exclusive Economic Zone. In the absence of clearly controlling precedent to the contrary, however, the Court cannot find that the decision to deny Defendant's motion to dismiss constituted a manifest error of law.

B. *Forum Non-Conveniens* and International Comity

Although the Court has discretion to reconsider the Predecessor Court's decision to deny Defendant's motion to dismiss on grounds of *forum non conveniens* and international comity, it does not believe that it would be in the interests of justice to do so. Given the facts of this case, this Court likely would have reached a different conclusion if it had been considering Defendant's motion to dismiss eighteen months ago. The Predecessor Court's decision on these matters was discretionary, however, and Defendants do not argue that the court applied an incorrect legal standard. Thus, it is difficult for this Court to find that the Predecessor Court' clearly committed a manifest error of law. Furthermore, it appears that some of the factors that may have weighed in favor of dismissal eighteen months ago may now tilt the other direction.[6]

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[6] The Court does agree with Defendants, however, that any questions as to whether an alternate forum exists in Mexico could

For example, Plaintiffs note that deposition testimony has been obtained from all witnesses, suggesting that difficulties in accessing sources of proof have been overcome. Plaintiffs have also provided additional evidence of Defendants' relationship with the United States that was uncovered through the discovery process. Defendants point out that the Predecessor Court made its decision on Defendant's motion to dismiss before determining that it would need to apply Mexican substantive law to the dispute. While this factor merits some weight in the balancing analysis, the Court cannot say that it renders the Predecessor Court's previous decision clearly erroneous.

The Court recognizes that Defendants have and will continue to incur costs and inconveniences that they would not have faced had this lawsuit been prosecuted in Mexico. Given the standard for a motion for reconsideration, and taking due account of the principles of judicial comity and law of the case, however, the Court declines to reconsider the Predecessor Court's decision to deny Defendant's motion to dismiss on grounds of forum non conveniens and international comity.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion for Reconsideration, Docket No. 67, is **DENIED.**

IT IS SO ORDERED.

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be resolved through a conditional order of dismissal. *See, e.g., Perusahaan Umum Listrik Negara Pusat v. M/V Tel Aviv*, 711 F.2d 1231, 1239 (5th Cir. 1983).

SIGNED this 24th day of March, 2008.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-05-419

[Filed July 21, 2006]

PERFORACIONES MARITIMAS MEXICANAS S.A. de C.V., et al.,	)
Plaintiffs,	)
v.	)
SEACOR HOLDINGS, INC., SEACOR MARINE MEXICO, INC., GRUPO TMM, S.A., and MARITIMAS MEXICANA S.A. de C.V.,	)
Defendants.	)

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

This case arises out of an allision between the M/V ISLA AZTECA ("AZTECA"), a Mexican flag vessel, and the MODU TOTONACA, a drilling rig located in the Bay of Campeche, Mexico. Now before the Court are Defendant Seacor Holding, Inc.'s ("Seacor") Rule

12(b)(6) Motion to Dismiss for Failure to State a Claim or, in the alternative, Motion for Summary Judgment, Defendant Seacor's First Amended Motion to Dismiss Based on Principles of International Comity, or, in the Alternative, Motion to Dismiss Based on Plaintiff's Lack of Standing, Defendant Seacor's Motion to Dismiss for Forum Non Conveniens, and Defendants Grupo TMM, S.A. ("TMM") and Maritima Mexicana, S.A. de C.V.'s ("MarMex") Motion to Dismiss for Lack of Subject Matter Jurisdiction, or, in the Alternative Forum Non Conveniens, or, in the Alternative, International Comity. For the reasons stated below: Seacor's Motion to Dismiss for Plaintiff Perforaciones Exploracion y Produccion's Lack of Standing is **DENIED AS MOOT**. TMM and MarMex's Motion to Dismiss for Lack of Subject Matter Jurisdiction is **DENIED**. Seacor's Motion to Dismiss for Failure to State a Claim is **DENIED AS MOOT**, and its Motion for Summary Judgment is **GRANTED**, and Plaintiffs' claims against Seacor and Seacor Marine Mexico, Inc. ("SMMI") are **DISMISSED WITH PREJUDICE**. Seacor's Motions to Dismiss for Principles of International Comity and *Forum Non Coveniens* are **DENIED AS MOOT**. TMM and MarMex's Motions to Dismiss for Principles of International Comity and *Forum Non Conveniens* are **DENIED**.[1]

I. Background

This case arises out of the March 31, 2004 allision between the AZTECA, a Mexican flag supply vessel,

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[1] The Court does not consider this Order worthy of publication. Accordingly, it has not requested and does not authorize publication.

and the TOTONACA, a mobile drilling rig located in the Bay of Campeche that appears to have been fixed at the time of the accident, within the territorial waters of Mexico. The AZTECA was owned and operated by MarMex, a Mexican shipping company. MarMex is 60% owned by TMM, and, at the time of the incident giving rise to this lawsuit, 40% owned by either Seacor or SMMI.[2] TMM is also a Mexican entity. The domiciles and principal places of business of TMM and MarMex are in Mexico. The TOTONACA was owned by Perforaciones Maritimas Mexicanas S.A. de C.V. ("PMM").

On May 6, 2004, MarMex filed an Ex Parte Declaratory Judgment Proceeding against Perforaciones Maritimas Protexa S.A. de C.V. (PMM's predecessor) based on the International Convention on Limitation of Liability Arisen from Maritime Law Claims, ratified by Mexico on August 9, 1994. On May 10, 2004, the Sixth District Court in Civil Matters in the Federal District in Mexico denied MarMex's request, and MarMex appealed. On October 27, 2004, the Sixth District Court vacated its earlier ruling and entered an Order granting MarMex's request for relief. That Court ordered service of MarMex's Original Petition, exhibits and Order on Perforaciones Exploracion y Produccion ("Protexa"), PMM and Pemex Exploracion y Produccion. This action is still pending in Mexico.

On May 7, 2004, PMM filed a 'Criminal Complaint" with the Investigating Prosecutor's Office in Ciudad

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[2] The Parties dispute whether the stock is held by Seacor or by SMMI.

del Carmen, Campeche, against MarMex for damages arising from the allision. This criminal proceeding was ultimately dismissed.

On July 28, 2005, Protexa and Certain Reinsuring Underwriters Subscribing to the Reinsurance Contract Policy No. AHE-030044 as Amended to Policy No. AHE-004004 ("Underwriters") filed suit against Seacor, TMM, and MarMex for damages sustained by the AZTECA during the allision. On July 14, 2006, the Court granted Plaintiffs' Motion for Leave to File an Amended Complaint. The Amended Complaint substituted PMM for Protexa, since it is undisputed that PMM is the real party in interest, and it also added SMMI as a defendant. The Amended Complaint also eliminated the cause of action for use of a dangerous weapon pursuant to Article 1913 of the Federal Civil Code of Mexico, so the only claims remaining arise under the admiralty and maritime laws of the United States.

Now before the Court are several motions to dismiss, referenced above. As manifested by the titles of the aforementioned Motions, many of the issues raised by the individual Defendants overlap with one another. Therefore, the Motions will be considered jointly, and each ground for dismissal will be discussed once.[3]

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[3] Defense Counsel is advised that in the future, for the sake of brevity and out of consideration for the limited resources of the Court, they should seriously consider filing a single *joint* dispositive motion when there is such a commonality of interests rather than have the Court sort through four redundant motions.

II. Plaintiff Protexa's Lack of Standing

Seacor originally moved to dismiss on the ground that Protexa lacked standing to sue.[4] In its Motion, it argued that Protexa was not the true party in interest because is did not own the TOTONACA and was not a party to the drilling contract between PMM (the rig owner) and Pemex. PMM was the actual owner of the TOTONACA. Recently, Plaintiffs realized the error in their pleadings, and filed for leave to amend their Complaint. On July 14, 2006, Plaintiffs were given leave to amend, and have since filed their Amended Complaint, which substituted PMM for Protexa. At this time, it appears that all of the proper Parties have been named, and the dispute over the proper plaintiff has been resolved. Therefore, Seacor's Motion to Dismiss on the ground that Protexa lacks standing to sue is **DENIED AS MOOT**.

III. Lack of Subject Matter Jurisdiction

A. Legal Standard

District courts are powerless to exercise jurisdiction in excess of the limited jurisdiction statutorily conferred upon them by Congress. *See Margin v. Sea-Land Servs., Inc.*, 812 F.2d 973, 976 (5th Cir. 1987). A case is properly dismissed for lack of subject matter jurisdiction when a court lacks the statutory or constitutional power to adjudicate the case. *See Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984). If the defendant subsequently challenges the plaintiff's stated basis for jurisdiction, the plaintiff

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[4] No one challenged the Underwriters' standing to sue.

bears the burden of establishing that jurisdiction exists. *See Harvey Const. Co. v. Robertson CECO Corp.*, 10 F.3d 300, 303 (5th Cir. 1994); *Margin*, 812 F.2d at 976. A court's consideration of such jurisdictional disputes should, however, focus only on discerning "some discreet jurisdiction requisite," as indicated by the facts alleged in the plaintiff's complaint; the inquiry should not address the merits of the plaintiff's claim. *Green v. Ferrell*, 664 F.2d 1292, 1294 (5th Cir. 1982).

B. Analysis

In their Motion to Dismiss, TMM and MarMex contend that this court lacks subject matter jurisdiction over Plaintiffs' claims. They argue that because the allision did not occur on the navigable waters of the United States, but in Mexican waters in the Bay of Campeche, this case does not fall within the Court's admiralty and maritime jurisdiction. The Court respectfully disagrees.

The claims asserted are basic tort claims that fall within the scope of this Court's admiralty jurisdiction. "[A] party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S. Ct. 1043, 1048, 130 L. Ed. 2d 1024 (1995). Thus, the injury or incident must have occurred on navigable waters, and the general character of the activity giving rise to the incident must bear a substantial relationship to traditional maritime activity. *Id.* at 534, 115 S. Ct. at 1051. *See also Sisson v. Ruby*, 497 U.S. 358, 110 S. Ct. 2892, 111 L. Ed. 2d

292 (1990); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972). An allision between a vessel and a drilling rig on navigable waters clearly satisfies both requirements for the exercise of admiralty tort jurisdiction. *See Kim v. Frank Mohn A/S*, 909 F. Supp. 474, 476–77 (S.D. Tex. 1995) (finding admiralty and maritime jurisdiction even though plaintiff and defendant were citizens of foreign countries and the vessel was foreign-owned and foreign-flagged). TMM and MarMex's argument that a tort must have occurred on the navigable waters of the United States to fall within this Court's admiralty and maritime jurisdiction is unpersuasive. In support of their argument, they rely upon the Supreme Court's decision in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 92 S. Ct. 418, 30 L. Ed. 2d 383 (1971). In that case, the Supreme Court stated, in *dicta*, that "[t]he historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that maritime law governs only those torts occurring *on the navigable waters of the United States*." *Id.* at 205, 92 S. Ct. at 421 (emphasis added). *Victory Carriers* considered the question whether state law or federal maritime law governs the suit of a longshoreman injured on a pier while moving cargo destined to be loaded on a ship. *See id.* at 202–03, 92 S. Ct. at 420. It did not involve questions of the applicability of maritime jurisdiction to accidents on foreign waters. Furthermore, the test for maritime and admiralty jurisdiction laid out in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* only requires that the tort occur on "navigable waters" rather than the "navigable waters of the United States." *See Grubart*, 513 U.S. at 534.

The Fifth Circuit has not provided a clear answer to this question. Recently, the Third Circuit noted that "a tort need not have occurred in waters under the jurisdiction of the United States for us to exercise admiralty jurisdiction." *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co. Ltd.*, 436 F.3d 349, 355, n.11 (3d Cir. 2006). Other courts have followed the *dicta* of *Victory Carriers*. *See e.g.*, *Dunham v. Hotelera Canco S.A.*, 933 F. Supp. 440, 448 (E.D. Va. 1996) (holding that the Court lacked admiralty jurisdiction over a tort that occurred in territorial waters of Mexico). Ultimately, this presents a question of policy best left to the purview of the Fifth Circuit, and this Court will follow any guidance that the Circuit might provide. In the meantime, the Court agrees with the analysis of admiralty jurisdiction as laid out in Thomas J. Schoenbaum's treatise, ADMIRALTY AND MARITIME JURISDICTION. Schoenbaum states that:

> In the United States collision jurisdiction potentially extends to the four corners of the globe, to the high seas and even foreign territorial waters.... The wide availability of jurisdiction in collision cases may encourage forum shopping to take advantage of differences in substantive law. *Blatant forum shopping, however, is a cause for concern, and the courts have adopted several ways of abstaining from exercising jurisdiction or of applying general maritime or foreign law in collision cases where justice requires.*

Arthur J. Schoenbaum, ADMIRALTY AND MARITIME LAW, § 14-9, at 131 (4th ed. 2004). One of the primary methods of abstention in cases such as these is the doctrine of *forum non conveniens*. *See id.* (noting that

the application of *forum non conveniens* "is particularly relevant in a case where the dispute is between parties and vessels of foreign nationalities [or where] the collision occurred in international or foreign waters..."). This case meets the standard set forth in *Grubart*. Admiralty jurisdiction exists, and concerns about whether this Court is the proper forum is best left to choice of law analysis and the applicability of the *forum non conveniens* doctrine.[5]

Therefore, TMM and MarMex's Motion to Dismiss for Lack of Subject Matter Jurisdiction is respectfully **DENIED**.

IV. Seacor Holding, Inc.'s Fed. R. Civ. P. 12(b)(6) Motion to Dismiss for Failure to State a Claim, or, in the Alternative, Motion for Summary Judgment

Seacor next argues that the lawsuit against it should be dismissed on the ground that Plaintiffs have failed to allege sufficient facts to support any of their claims against Seacor because Seacor did not own any stock in MarMex, the owner and operator of the

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[5] TMM and MarMex also argue that this Court lacks diversity jurisdiction because Parties on both sides are Mexican citizens. PMM is a Mexican corporation, and TMM and MarMex are both Mexican corporations. The Court finds that complete diversity is lacking, and the only basis for jurisdiction in this case is this Court's admiralty and maritime jurisdiction. *See Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp.*, 506 F.2d 757, 758 (5th Cir. 1975) (finding no diversity jurisdiction in a suit brought by an alien against a citizen of a state and another alien). Additionally, both Seacor and Plaintiff Underwriters have their principal place of business in Texas.

AZTECA. Seacor alleges that SMMI is the actual shareholder of MarMex, along with TMM. Alternatively, Seacor argues that it is entitled to summary judgment because even if it is a shareholder of MarMex, as a shareholder it cannot be held liable for the acts of the corporation, and MarMex is a Mexican corporation. The Court finds that whether Seacor or SMMI is the appropriate shareholder is a moot point. As shareholders of a corporation, they are insulated from liability. Plaintiffs have failed to raise any question of fact to suggest otherwise.

A. Motion to Dismiss for Failure to State a Claim Pursuant to Fed. R. Civ. P. 12(b)(6)

A party is entitled to dismissal under Fed. R. Civ. P. 12(b)(6) when an opposing party fails to state a claim upon which relief may be granted. When considering a motion to dismiss for failure to state a claim, the Court accepts as true all well-pleaded allegations in the complaint and views them in the light most favorable to the plaintiff. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (noting that a court must construe the complaint liberally in favor of the plaintiff); *see also Malina v. Gonzales*, 994 F.2d 1121, 1125 (5th Cir. 1993). A motion to dismiss should be granted only when it appears without a doubt that a plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 998, 152 L. Ed. 2d 1 (2002). *See also Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). "A motion to dismiss under Rule 12(b)(6) is

viewed with disfavor and is rarely granted." *Collins*, 224 F.3d at 498.

B. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552–53, 91 L. Ed. 2d 265 (1986). The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. The non-moving party must come forward with "specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The court must view all evidence in the light most favorable to the non-movant. *See, e.g., Broussard v. Parish of Orleans*, 318 F.3d 644, 650 (5th Cir. 2003). If the evidence would permit a reasonable fact finder to find in favor of the non-moving party, summary judgment should not be granted. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

C. Analysis

Seacor claims that it is entitled to dismissal because Plaintiffs failed to allege any facts supporting liability against it. In the alternative, Seacor argues that there is no genuine issue of material fact on any

of Plaintiffs' claims and it seeks summary relief pursuant to FED.R.CIV.P. 56. First, Seacor claims that it does not own and has not owned stock in MarMex, but that the stock in MarMex is actually held by SMMI. Second, that even if it did own stock in MarMex, it is insulated from liability because MarMex is a corporation.

Plaintiffs originally brought suit against Seacor and not SMMI. However, since Seacor filed its 12(b)(6) Motion, Plaintiffs moved for leave to amend their Complaint in part to add SMMI as a Defendant. On July 14, 2006, Plaintiffs were given leave to amend, and they have since filed their Amended Complaint, which added SMMI as a defendant. In their Amended Complaint, Plaintiffs allege that MarMex is a joint venture of Seacor and TMM, or alternatively, SMMI and TMM, and that Defendants are jointly and severally liable for the negligent acts, omissions, and breach of warranty alleged on the basis that Defendants constituted a single business enterprise, carrying out a common business objective. Plaintiffs allege that their claims are imputable to Seacor and TMM, or alternatively SMMI and TMM because they were all mutual agents and principals in the operations of the AZTECA. Plaintiffs only theory for imputation is that MarMex is a joint venture.

The declarations of Seacor Vice President John Gellert, MarMex Deputy Director Carlos Alberto Lopez Madujano, and the TMM Legal Director Marco Flavio Rigada Soto demonstrate two things. First, that MarMex was owned by two shareholders: SMMI and TMM. Second, that MarMex is a Mexican corporation, formed on March 16, 1961 under the laws of Mexico as a Mexican shipping company. Although Plaintiffs

refer to numerous publications from the Internet in support of their arguments that MarMex is a joint venture and that Seacor owned stock in MarMex, these documents are not enough to create a genuine issue of fact as to MarMex's corporate status. As the Court has previously stated, "information obtained from the Internet is 'inherently untrustworthy.'" *Barbour v. Head*, 178 F. Supp. 2d 758, 760 n.3 (S.D. Tex. 2001) (quoting *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774 (S.D. Tex. 1999)). At this stage, allegations on the Internet, without more, are not enough to create a genuine issue of material fact regarding MarMex's ownership and corporate status. The Court finds that MarMex is a Mexican corporation. Plaintiffs have not alleged that the corporate veil should be pierced in this instance. *See Baker v. Raymond Int'l, Inc.*, 656 F.2d 173, 179–80 (5th Cir. 1981) (explaining that in a maritime tort action, a plaintiff generally has recourse against the corporate entity that incurred the liability and not its parents, stockholders or other parties connected with the entity). Additionally, Plaintiffs have produced no evidence indicating that the corporate veil should be pierced in this case, or that MarMex is inadequately insured. Therefore, Seacor's Motion for Summary Judgment is hereby **GRANTED**, and Plaintiffs' claims against Seacor and SMMI are **DISMISSED WITH PREJUDICE**. Seacor's remaining Motions to Dismiss on the grounds of international comity and forum non conveniens are **DENIED AS MOOT**.

V. International Comity

TMM and MarMex next move for dismissal on the ground of ground of international comity, which is the "recognition which one nation allows within its

territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S. Ct. 139, 143, 40 L. Ed. 95 (1895). *See also Societe Nationale Industrielle Aeropatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 543 n.27, 107 S. Ct. 2542, 2556, 96 L. Ed. 2d 461 (1987); *In Re French*, 440 F.3d 145, 152-53 (4th Cir. 2006); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 63 (S.D. Tex. 1994). It "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton*, 159 U.S. at 163–64, 16 S. Ct. at 143.

In making a determination as to whether to exercise such discretion, courts have generally referred the factors listed in RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987). *See In Re French*, 440 F.3d at 153 (collecting cases); *Sequihua*, 847 F. Supp. at 63. Those factors include: (1) the link between the regulating state and the relevant activity; (2) the connection between that state and the person responsible for the relevant activity; (3) the nature of the regulated activity and its importance to the regulating state; (4) the effect of regulation on justified expectations; (5) the significance of regulation to the international system; (6) the extent of other nations' interests; and (7) the likelihood of conflict with other nations' regulations. *See* REST. (THIRD), *supra*, § 403(4). *See also In Re French*, 440 F.3d at 153. In *Sequihua v. Texaco, Inc.*, the Southern District of Texas applied a somewhat simpler list of factors, including: (1) whether the defendant sought to be sued in the United States has consented to jurisdiction in

the foreign forum; (2) the location of the alleged wrong and extent to which it takes place in a foreign state; (3) residence of the parties; (4) enforcement of a judgment entered by the United States forum; (5) interest of the foreign state in exercising its sovereign right to regulate its own environment and resources; and (6) whether the foreign nation's law conflicts with United States law. *See Sequihua*, 847 F. Supp. at 63 (citing *Timberlane Lumber Co. v. Bank of America Nat'l Trust and Savings Assn.*, 749 F.2d 1378 (9th Cir. 1984). Applying all of these factors, the Court finds that principles of international comity do not warrant dismissal.

On the one hand, the allision and damages occurred in Mexican waters, between a Mexican vessel and a Mexican rig, owned by Mexican corporations. Parties on both sides are Mexican citizens, and the Mexican courts would have jurisdiction over all the Parties in this case. Finally, Mexico clearly has an interest in regulating torts that occur within its territorial waters. On the other hand, there has been no persuasive argument made by TMM and MarMex that there would be problems enforcing a judgement entered by this Court, or that there are any substantial conflicts with Mexican law. Plaintiffs' Amended Complaint only alleges causes of action arising under the general maritime law of the United States. There is no indication that this Court will be called upon to interpret or apply Mexican law. Although there have been other proceedings involving these Parties in Mexico, there is no indication at this time that those proceedings conflict with the lawsuit filed in this Court.

While the facts of this case present a close question, TMM and MarMex have failed to show that the principles of international comity should disrupt Plaintiffs' choice of forum. Therefore, TMM and MarMex's Motion to Dismiss on the ground of international comity is respectfully **DENIED**.

VI. Forum Non Conveniens

Finally, TMM and MarMex have moved to dismiss on the ground of *forum non conveniens*. The doctrine of *forum non conveniens* derives from the proposition that "[i]n rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722, 116 S. Ct. 1712, 1724, 135 L. Ed. 2d 1 (1996). Pursuant to this doctrine, a court may dismiss a case in favor of a foreign forum if the defendant establishes that the convenience of the parties and the court, coupled with the interests of justice, indicate that the lawsuit is better suited for adjudication elsewhere. *See Karim v. Finch Shipping Co., Ltd.*, 265 F.3d 258, 268 (5th Cir. 2001).

Federal courts employ a two-part analysis when applying the *forum non conveniens* doctrine in the international context. *See Piper Aircraft v. Reyno* 454 U.S. 235, 255-56, 102 S. Ct. 252, 265–66, 70 L. Ed. 2d 419 (1981). The first step involves a determination of whether an adequate and available foreign forum exists. *See Sydow v. Acheson & Co.*, 81 F. Supp. 2d 758, 768 (S. D. Tex. 2000). Next, if an adequate alternative forum is available, the court must decide whether "certain private and public interest factors weigh in favor of dismissal." *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 424 (5th Cir. 2001). If

the relevant private interest factors advocate dismissal, however, no inquiry into the public interest factors in needed. *See Baris v. Sulpicio Lines*, 932 F.2d 1540, 1550-51 (5th Cir. 1991). While undertaking both steps of this analysis, courts must remain mindful that "the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient." *Piper Aircraft*, 454 U.S. at 256, 102 S. Ct. at 266. *See also Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 827 (5th Cir. 1986). The "*forum non conveniens* determination is committed to the sound discretion of the trial court." *Piper Aircraft*, 454 U.S. at 266 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511-12 (1947)).

The private factors to be considered in a *forum non conveniens* analysis relate to the convenience of the parties, and include: the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of viewing the premises, if such viewing would be appropriate to the action; other practical problems that make a trial of a case easy, expeditious, and inexpensive; enforceability of judgment; and whether the plaintiff has sought to vex, harass, or oppress the defendant. *See Karim*, 265 F.3d at 268 n.14 (citations omitted). The "public interest" factors include: administrative difficulties; reasonableness of imposing jury duty on the people of the community; holding the trial in the view of those affected; and the local interest in having localized controversies decided at home. *See id.*

A. Adequate and Available Forum

Defendant argues that Mexico presents an adequate alternative forum for the adjudication of this dispute. The Parties have previously availed themselves of the Mexican legal system or are subject to jurisdiction in the Mexican courts. There is no indication that Mexican law would not allow redress of any of the claims alleged by Plaintiff. Generally, an alternative forum is available to the plaintiff when the foreign court can assert jurisdiction over the litigation sought to be dismissed. *See Piper*, 454 U.S. at 254 n. 22, 102 S. Ct. at 265 n. 22 (citation omitted) ("Ordinarily, [the requirement] will be satisfied when the defendant is amenable to process in the other jurisdiction"). The alternative forum is adequate as long as the parties will be treated fairly and will not be deprived of all remedies there. *See Sydow*, 81 F. Supp. 2d at 768. *See also Piper*, 454 U.S. at 254 n. 22, 102 S. Ct. at 265 n. 22. Plaintiff has not presented, and the Court is not aware of, any obstacles to justice within the Mexican court system. Accordingly, the Court finds that Mexico is an available and adequate forum for litigation of this matter.[6]

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[6] The Court notes that Plaintiffs' argument that Plaintiff Underwriters would not be subject to jurisdiction of the Mexican courts is doubtful, and Plaintiffs offer no support for this argument other than the indication that Plaintiff Underwriters claim not to consent. If Plaintiff Underwriters choose to insure Mexican companies, they cannot complain when they are haled into court in Mexico.

B. Private Interests

Although an adequate and available forum exists, the private interest factors in this case do not compel dismissal. Any documentary evidence needed in the preparation and presentation of this case can be transferred between Mexico and Texas with relative ease, so that bears no burden on this *forum non conveniens* analysis. Additionally, Plaintiffs have shown that many of the relevant documents have already been produced, and they have been translated. While the cost and ability of obtaining testimony and attendance of both willing and unwilling witnesses weighs somewhat in favor of a Mexican adjudication, Plaintiffs have identified several witnesses amenable to this Court's jurisdiction, and most, if not all, of the witnesses in this case will likely be within the employ of the Parties, and their attendance at trial can be compelled. There has been no showing that Plaintiffs sought this forum to vex or harass Defendants.

Plaintiffs have shown that the distance between the location of the vessels involved in this allision and the location of the Parties is equally inconvenient whether this matter is tried in Mexico or tried in Galveston. Additionally, trial in this case is set for September 11, 2006. The Motions now before the Court did not become ripe until June 16, 2006, a mere three months away from trial. This matter would be significantly delayed if it were dismissed to be refiled in Mexico at this late stage. Thus, the Court finds that private interest factors do not support dismissal for *forum non conveniens*.

3. Public Interest

Courts often turn to the interests of the public when considering an argument of *forum non conveniens*. The "public interest" factors include: administrative difficulties, such as burdening court dockets; the reasonableness of imposing jury duty on the people of the community; holding the trial in the view of those affected; and the local interest in having localized controversies decided at home. *See Karim*, 265 F.3d at 268 n.14 (citations omitted).

Although this Court has substantial docket obligations, it is by no means too much of a burden to handle this case, and thus far no administrative difficulties have presented themselves. Next, this case is not set for the Court's jury docket, so it will not be imposing the burden of jury duty on the citizens of this Division. Furthermore, Plaintiffs have amended their complaint to only allege causes of action arising under the general maritime laws of the United States, which this Court is aptly suited to render judgment upon. While the Court concedes that Mexico clearly has an interest in having this controversy decided in its own courts, that alone is not enough to warrant dismissal. The public interest factors in this suit do not warrant dismissal based on the doctrine of *forum non conveniens*.

TMM and MarMex have failed to show that trial would be more convenient in Mexico. Therefore, TMM and MarMex's Motion to Dismiss on the ground of *forum non conveniens* is respectfully **DENIED**.

V. Conclusion

The Court thanks both Parties for the excellent advocacy displayed in the well-prepared, albeit numerous, briefs submitted in connection with this Motion. For the reasons stated above, the Court orders that: (1) Seacor's Motion to Dismiss on the ground that Protexa lacks standing to sue is **DENIED AS MOOT**; (2) TMM and MarMex's Motion to Dismiss for Lack of Subject Matter Jurisdiction is respectfully **DENIED**; (3) Seacor's Motion for Summary Judgment is hereby **GRANTED**, and Plaintiffs' claims against Seacor and SMMI are **DISMISSED WITH PREJUDICE**; (4) Seacor's remaining Motions to Dismiss for Principles of International Comity and *Forum Non Conveniens* are **DENIED AS MOOT**; (5) TMM and MarMex's Motion to Dismiss on the ground of International Comity is **DENIED**; and (6) TMM and MarMex's Motion to Dismiss for *Forum Non Conveniens* is **DENIED**. All taxable costs, expenses and attorneys' fees shall be borne by the Party incurring same.

IT IS SO ORDERED.

DONE this 21st day of July, 2006, at Galveston, Texas.

/s/ Samuel B. Kent
Samuel B. Kent
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C. A. NO. G-05-419
ADMIRALTY

[Filed July 17, 2006]

PERFORACIONES EXPLORACIÓN Y PRODUCCIÓN and CERTAIN REINSURING UNDERWRITERS SUBSCRIBING TO REINSURANCE CONTRACT NO. AHE-030044 AS AMENDED TO NO. AHE-04004,	)
Plaintiffs,	)
VS.	)
SEACOR HOLDINGS, INC., GRUPO TMM, S.A., and MARÍTIMAS MEXICANAS, S.A. de C.V.,	)
Defendants.	)

ORDER

Before the Court is Plaintiff Perforaciones Exploración y Producción, et al.'s Opposed First

Motion for Leave to File Amended Complaint. The Court, after considering the motion and response thereto and arguments of counsel, is of the opinion that Plaintiffs' motion is meritorious; it is therefore,

ORDERED that Plaintiffs' Opposed First Motion for Leave to File Amended Complaint is GRANTED.

ORDERED this 14th day of July, 2006.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-41228

[Filed December 28, 2006]

PERFORACIONES EXPLORACIO 'N Y PRODUCCIO 'N, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing To Reinsurance Contract No AHE-030044 As Amended to No AHE-04004	)
Plaintiffs - Appellees	)
v.	)
GRUPO TMM SA; MARITIMAS MEXICANAS SA DE CV, also known as MarMex	)
Defendants - Appellants	)

D.C. Docket No. 3:05-CV-419
Appeal from the United States District Court for the Southern District of Texas, Galveston.

Before KING, BARKSDALE, and GARZA, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the appeal is dismissed for lack of jurisdiction.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE : DEC 22 2006

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: /s/ _____
Deputy

New Orleans, Louisiana DEC 22 2006

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 06-41228

(Summary Calendar)

[Filed December 28, 2006]

PERFORACIONES EXPLORACIO 'N Y PRODUCCIO 'N, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing To Reinsurance Contract No AHE-030044 As Amended to No AHE-04004

Plaintiffs-Appellees

versus

GRUPO TMM SA; MARITIMAS MEXICANAS SA DE CV, also known as MarMex

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:05-CV-00419

Before KMG, BARKSDALE, and GARZA, Circuit Judges.

PER CURIAM:*

This case arises out of the March 2004 allision of the M/V ISLA AZTECA, a Mexican flagged supply vessel, with the TOTANCA, a Mexican flagged mobile offshore drilling unit located in the Bay of Campeche, Mexico. The AZTECA was owned and operated by Maritimas Mexicanas S.A. de C.V. ("MarMex"), a Mexican shipping company partially owned by Grupo TMM, S.A. ("TMM") (collectively, "Appellants"). The TOTANCA was owned by Perforaciones Maritimas Mexicanas, S.A. de C.V. ("PMM"). As a result of the allision, MarMex filed a limitation of liability action in Mexico, and a limitation fund was established in October 2004.

In July 2005, Perforaciones Exploracion y Production ("Protexa") and certain reinsuring Underwriters subscribing to Reinsurance Policy No. AHE 030044 as Amended to Policy No. AHE-04004 (the "Underwriters") (collectively, "Appellees") filed this suit in the United States District Court for the Southern District of Texas in Galveston for damages sustained by the TOTANCA during the allision.[1] Appellants filed a motion to dismiss the suit on three grounds: lack of subject matter jurisdiction,

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R 47.5.4.

[1] PMM was later substituted for Protexa as the real party in interest.

international comity, and *forum non conveniens*.[2] On July 21, 2006, the district court issued an order denying Appellants' motion to dismiss, ruling that the suit fell within the court's admiralty jurisdiction, that the principles of international comity did not warrant dismissal, and that dismissal based on *forum non conveniens* was also unwarranted.

Appellants filed a notice of appeal pursuant to 28 U.S.C. § 1292(a)(3), which provides for federal appellate jurisdiction over interlocutory decrees "determining the rights and liabilities of the parties to admiralty cases." 28 U.S.C. § 1292(a)(3). Appellees move to dismiss the appeal, arguing that the district court's denial of Appellants' motion to dismiss is not an appealable interlocutory order because it is not a "decree . . . determining the rights and liabilities of the parties" within the meaning of § 1292(a)(3). Appellants disagree. According to Appellants, the district court's order determines their rights because it "denies [their] substantive right to limit their liability and further denies [their] substantive right to have claims arising out of the allision at issue heard and determined in Mexico under Mexican law." Appellants assert that the order "ignores the Mexican limitation action" and effectively increases the Mexican limitation fund by subjecting Appellants to potential liability in the United States. Therefore, Appellants argue, the order ignores and/or extinguishes their substantive right to limit their liability under Mexican law.

[2] Appellants subsequently filed a notice and motion to apply Mexican law pursuant to Federal Rule of Procedure 44.1. This motion remains pending in the district court.

"'To be appealable under section 1292(a)(3), the decree must determine the substantive rights and liabilities of the parties to the case." *Francis ex rel. Francis v. Forest Oil Corp.*, 798 F.2d 147, 149 (5th Cir. 1986). Courts construe this jurisdictional grant narrowly. *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 564 (5th Cir. 1981); *accord Blue Water Yacht Club Ass'n v. New Hampshire Ins. Co.*, 355 F.3d 139, 141 (2d Cir. 2004). Even if an order has important procedural consequences, it is not appealable under § 1292(a)(3) if it does not determine the parties' substantive rights and liabilities. *In re Ingram Towing Co.*, 59 F.3d 513, 517 (5th Cir. 1995).

The district court's denial of Appellants' motion to dismiss did not determine Appellants' substantive rights or liabilities. The district court did not decide whether Appellants were entitled to limit their liability under Mexican law, nor would such a determination be appealable under § 1292(a)(3), given that the underlying issue of liability has yet to be determined. *See Bucher-Guyer AG v. M/V Incotrans Spirit*, 868 F.2d 734, 735 (5th Cir. 1989) (holding that "[t]he decision whether the $500 COGSA limitation on damages applies in this case is not a decision determining the rights and liabilities of the parties"). What the district court decided was that the suit fell within the court's admiralty jurisdiction and that the suit could be heard in Galveston, Texas. Such decisions do not determine the rights or liabilities of the parties for purposes of § 1292(a)(3). *See Austracan (USA.), Inc. v. M/V Lemoncore*, 500 F.2d 237, 240 (5th Cir. 1974) ("Denial of a motion to dismiss for lack of admiralty jurisdiction does not decide the parties' rights so as to be within the statute . . . authorizing interlocutory

appeals in admiralty from orders that determined rights and liabilities of parties.") (citing *Jack Nielson, Inc. v. Tug Peggy*, 428 F.2d 54, 55 (5th Cir. 1970) (holding that "[t]he district court's denial of the motion to dismiss for lack of jurisdiction did not decide the parties' rights and liabilities within the meaning of the statute" because "[i]t did not go to the merits of the claim")). Accordingly, this Court does not have jurisdiction to hear this interlocutory appeal under § 1292(a)(3).

Appellees' motion to dismiss the appeal is GRANTED, and the case is REMANDED to the district court for further proceedings.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-05-419

[Filed May 10, 2007]

PERFORACIONES MARÍTIMAS MEXICANAS S.A. de C.V., et al.,	)
Plaintiffs,	)
v.	)
GRUPO TMM, S A de C.V., et al.,	)
Defendants.	)

ORDER

This case arises out of an allision between the M/V ISLA AZTECA ("Azteca") and the Mobile Offshore Drilling Unit Totonaca ("Totonaca"), which occurred in the Bay of Campeche, Mexico on March 31, 2004. Plaintiff Perforaciones Marítimas Mexicanas, S.A. de C.V. ("PMM") was the owner and operator of the Totonaca, and Defendant Marítima Mexicana S.A. de C.V. ("MarMex") was the owner and operator of the Azteca. Defendants Grupo TMM S A. de C.V. ("TMM")

and MarMex filed an Opposed Motion and Notice to Apply Mexican Law and an Opposed Motion for Summary Judgment and Transfer to Mexico's Sixth District Court in Civil Matters of the First Circuit, along with various Supplements and Exhibits. Plaintiffs PMM and Certain Reinsuring Underwriters Subscribing to Reinsurance Contract No. AHE-030044 as Amended to No. AHE-04004 ("Underwriters") filed a Response to the Motions, and MarMex and TMM filed a Reply. All of the briefing has been excellent. Plaintiffs then filed a Surreply. MarMex and TMM also filed a Supplement to their Reply. For the reasons outlined below, Defendants' Motions are **DENIED**.[1]

I. Background[2]

The allision between the Azteca and the Totonaca occurred on March 31, 2004. The Azteca, a Mexican flagged supply vessel, was owned and operated by MarMex on the date of the allision, and TMM owned 60% of MarMex. Both TMM and MarMex are Mexican entities. The Totonaca, a Mexican flagged mobile drilling rig that was affixed to the floor of the Bay of Campeche at the time of the allision, was owned and operated by PMM, a Mexican corporation.

On May 6, 2004, MarMex filed a petition in Mexico to limit its liability for the allision (the "Mexican

[1] The Court does not consider this Order worthy of publication. Accordingly, it has not requested and does not authorize publication.

[2] A more detailed procedural history is outlined in the Order on Defendants' Motion to Dismiss, which is hereby incorporated by reference.

Limitation") pursuant to the International Convention on Limitation of Liability for Maritime Claims, London 1976 (the "London Convention"), which was ratified by Mexico in the Mexican Navigation Act of 1994. This proceeding resulted in the establishment of a limitation fund for all parties claiming damages arising from the Bay of Campeche allision.

On May 26, 2004, PMM's predecessor initiated a *Querella*, which is a criminal complaint or accusation for an alleged or suspected criminal offense, against MarMex and the crew of the Azteca in Cuidad del Carmen, Mexico. The *Querella* was eventually dismissed after an investigation indicated there was no evidence of criminal conduct.

On July 28, 2005, PMM's predecessor filed this lawsuit seeking damages for negligence, gross negligence, and unseaworthiness. In Defendants' answer, they claimed that the Mexican Limitation applies to this case. They then filed a Motion to Dismiss based on international comity and *forum non conveniens*, in which they argued that the *Querella* and the Mexican Limitation action conflicted with this case. The Court found that "there have been other proceedings involving these Parties in Mexico, [but] there is no indication at this time that those proceedings conflict with the lawsuit filed in this Court." Order on Defendants' Motion to Dismiss at 13. TMM and MarMex filed a Notice of Appeal to the Fifth Circuit on July 31, 2006. On November 30, 2006, the Fifth Circuit dismissed the appeal for lack of jurisdiction.

In the meantime, TMM and MarMex filed a Motion for Summary Judgment. They also gave the Court

notice that they intended to raise an issue concerning the law of Mexico pursuant to Federal Rule of Civil Procedure 44.1 by filing a Motion and Notice to Apply Mexican Law. A hearing on the Motion and Notice to Apply Mexican Law was held on February 15, 2007, and the Parties indicated they were having settlement discussions. The case was stayed until March 2, 2007 pending these discussions. On March 2, 2007, the Parties appeared before the Court at a Status Conference and stated that they were unable to settle. They also indicated that a Hearing in which the Court heard testimony from the Parties' perspective experts on Mexican law may be helpful to the Court's ultimate resolution of the Motions. The Court agreed, and said Hearing occurred on April 27, 2007 ("Second Hearing").

The Court was honored to hear the testimony of two renowned experts on Mexican Law during the Second Hearing. Defendants' expert, Ignacio Ruiz Melo ("Dr. Melo"), has been practicing admiralty law in Mexico for over fifty years. Dr. Melo has a rich ancestoral history in the field, as he is the fourth generation in his family to practice admiralty law in Mexico, and his son, who is also an admiralty lawyer, is the fifth. He has been a professor of maritime law and the law of the sea since 1969, and he has served as the Dean of two different Mexican law schools. He has also been a consultant to the Mexican Delegation in several Congresses and Diplomatic Conferences on Maritime Law. In fact, Dr. Melo was the only practicing maritime lawyer on the Mexican commission that promulgated the Navigation Act of 1994.

Plaintiffs' expert, Jose David Enriquez Rosas ("Dr. Enriquez"), has been practicing law since 1997, and he works for a law firm in which he is the head of the section dealing with admiralty and maritime law. He has written eight textbooks about various admiralty issues, and Dr. Melo wrote complimentary introductions in three of Dr. Enriquez's books. Dr. Enriquez has acted as legal advisor to the Government of Mexico since 2000. He was responsible for collecting the drafts of the 2006 Navigation Act and is responsible for the coordination and development of regulations arising from that Act. He is a research fellow at two universities and sometimes teaches maritime law. Dr. Enriquez has an LLM from Spain and England and a Ph.D. from Mexico, all in maritime law. In over sixteen years on this Bench, the Court has rarely had the privilege of such extraordinarily qualified experts testifying on such an interesting subject.

II. Motion to Apply Mexican Law

A. Legal Standard

The question of whether United States or foreign substantive law applies to a maritime injury case is "made pursuant to a multifactored analysis set out in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953) and further elaborated in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 90 S. Ct. 1731, 26 L. Ed. 2d 252 (1970)." *Schexnider v. McDermott Int'l, Inc.*, 817 F.2d 1159, 1161 (5th Cir. 1987). Under these cases, the following eight factors determine the choice of law: (1) the allegiance or domicile of the plaintiff; (2) the place of the contract; (3) the allegiance of the defendant shipowner; (4) the law of the flag; (5) the

accessibility of the foreign forum; (6) the place of the wrongful act; (7) the law of the forum; and (8) the defendant shipowner's base of operations. These factors, while potentially suggestive of a mechanical approach to determining choice of law, are not all of equal or even comparable significance. *See Rhoditis*, 398 U.S. at 308–09, 90 S. Ct. at 1733–34;*Schexnider*, 817 F.2d at 1161. Generally, the law of the flag and the defendant shipowner's base of operations weigh most heavily in the determination. *See Lauritzen*, 345 U.S. at 583, 73 S. Ct. at 929 (stating that the law of the flag is of "cardinal importance" in determining applicable law); *Rhoditis*, 398 U.S. at 309–10, 90 S. Ct. at 1734–35 (holding that the defendant's New York base of operations favored U.S. law despite the ship's Greek flag). On the other hand, the place of the wrongful act and the inaccessibility of a foreign forum are seldom relevant to a maritime choice-of-law determination. *See Lauritzen*, 345 U.S. at 582, 73 S. Ct. at 929 ("The test of location of the wrongful act or omission . . . is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate."); *id.* at 589–90, 73 S. Ct. at 932 (finding an argument that justice required "adjudication under American law to save seamen expense and loss of time in returning to foreign forum" unpersuasive). The national interests to be served by the application of U.S. law may also influence the weight to be assigned each factor. *See Schexnider*, 817 F.2d at 1161 (citing *Rhoditis*, 398 U.S. at 308–09, 90 S. Ct. at 1733–34).

B. Analysis

TMM and MarMex claim the *Lauritzen Rhoditis* factors overwhelmingly require to application of

Mexican law. PMM and the Underwriters, on the other hand, claim that the *Lauritzen Rhoditis* factors favor U.S. law.[3]

1. Place of the Wrongful Act

The first factor a court considers in a *Lauritzen-Rhoditis* analysis is the place of the wrongful act. TMM and MarMex claim that the allision took place in Mexican waters and, specifically, within the Exclusive Economic Zone ("EEZ") of Mexico. Plaintiffs agree that the allision occurred within the Mexican EEZ, but they assert that the EEZ merely gives Mexico the right "to exercise exclusive control over economic matters involving fishing, the seabed, and the subsoil," but not the right to exclusive control over navigation. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 965 n.3 (4th Cir.), *cert. denied*, 528 U.S. 825, 120 S. Ct. 74, 145 L. Ed. 2d 63 (1999). Because the accident did not occur in Mexican territorial waters, Plaintiffs argue that the place of the wrongful act is of minimal importance.

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[3] PMM and the Underwriters also assert that Defendants must establish that a conflict exists between the applicable Mexican substantive law and U.S. substantive law before the Court conducts a choice of law analysis. In support of this assertion Plaintiffs cite a Fifth Circuit case about whether Texas must recognize an English judgment, which is inapposite. *See Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 332–33 (5th Cir. 2002) (quoting *Hunt v. BP Exploration Co.*, 492 F. Supp. 885, 910 (N.D. Tex. 1980)). Plaintiffs have not presented the Court with any Fifth Circuit authority indicating that Defendants are required to present the Court with the provisions of foreign substantive law that are in conflict with U.S. substantive law before a *Lauritzen-Rhoditis* analysis is conducted.

The Court acknowledges that the accident occurred in the EEZ of Mexico, which may not be technically within Mexican territorial waters. However, the "place of the wrongful act" factor should not be disregarded on such a technicality. Even though the wrongful act did not occur within Mexico, it occurred approximately 46 miles off the coast of Mexico in the Bay of Campeche. This location is substantially closer to Mexico than it is to the United States, and this factor should thus weigh in favor of applying Mexican law.

2. The Law of the Flag

Next the Court considers the law of the flag, which is "of cardinal importance" in the *Lauritzen-Rhoditis* analysis. *Lauritzen*, 345 U.S. at 584. Both the Azteca and the Totonaca are Mexican flagged. Plaintiffs argue that this factor should not weigh "too heavily in favor of applying the law of Mexico" because the Azteca has substantial contacts with the United States. Plaintiffs cite *Rhoditis* in support of this assertion. In *Rhoditis*, the Supreme Court held that the law of the United States should apply even though the flag, the seaman's nationality, and the contract all weighed in favor of Greek law. *See Rhoditis*, 398 U.S. at 308–10, 90 S. Ct. at 1733–34. The Supreme Court stated that these factors were "minor weights in the scales compared with the substantial and continuing contacts that [the shipowner] ha[d] with this country." *Id.* at 310, 90 S. Ct. at 1734. Here, Plaintiffs claim that the Azteca was operating under a U.S. flag until 2004 and continues to maintain significant contacts with the United States, but they did not provide the Court with any evidence of the alleged significant contacts. In *Rhoditis*, the vessel and its sister ships

"were earning income from cargo originating or terminating" in the United States. *Id.* Here, Plaintiffs claim that the Azteca may have been operating under a Mexican "flag of convenience" at the time of the accident. However, the only additional evidence offered in support of this assertion is that the Azteca was purchased by a U.S. company for $1. Plaintiffs have failed to make a showing that the contacts the Azteca had with the United States are in any way comparable to the contacts the *Rhoditis* vessel had. Because Plaintiffs have not shown that the contacts the Azteca had with the United States were substantial and continuous, the law of the flag factor provides significant weight in favor of the application of Mexican law.[4]

3. The Allegiance or Domicile of the Injured

While there is not an injured individual in this action, Plaintiffs could be considered to be "injured" because their vessel was damaged. Thus, the Court will consider this factor. Plaintiffs claim, without citing authority, that PMM's domicile should not be considered because it chose to bring suit in the United States. The Court is not conducting a venue analysis, so it does not find this argument persuasive. PMM is a Mexican corporation, and its base of operations is in Mexico, which weighs in favor of Mexican law. The

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[4] Plaintiffs assert that discovery is still pending and imply that they may be able to establish that the Azteca was operating under a flag of convenience at a later date. However, this case was filed in July, 2005, and extensive discovery has already been conducted. *See* Defs.' Reply at 7 n.5 (noting that Defendants have already produced over 6,600 documents and deposed a company representative who explained Defendants' operations)

other Plaintiffs are the Underwriters, and the lead underwriter, Navigators Insurance Services of Texas, Inc., is based in Houston, Texas. Since one Plaintiff is domiciled in Mexico and one is in the United States, the Court finds that this factor is neutral.

4. The Allegiance of the Defendant Shipowner

The next factor to be considered is the allegiance of the defendant shipowner. *See Rhoditis*, 398 U.S. at 309–10, 90 S. Ct. at 1734–35. TMM and MarMex are both Mexican companies. Plaintiffs claim that the weight of this factor should be diminished because the Azteca was purchased for $1 from a U.S. company and continues to maintain significant contact with the U.S. following the sale. However, the *ship*'s allegiance is not in question, here. That should be considered under the law of the flag. The Azteca's contacts with the U.S. have little relevance in the determination of its owner's allegiance, which is, unquestionably, Mexico. Thus, this factor weighs in favor of the application of Mexican law.

5. The Place of the Contract

The fifth *Lauritzen-Rhoditis* factor is the place of contract. The facts of the instant case do not involve a contract between the Parties. Thus, this factor bears no weight in the analysis.

6. The Inaccessibility of the Foreign Forum

In *Laurtizen*, the Supreme Court considered whether "justice requires adjudication under American law to save seamen expense and loss of time in returning to a foreign forum." *Lauritzen*, 345 U.S. at

589-90, 73 S. Ct. at 932. Here, the Court must consider whether the application of Mexican law would require adjudication of the dispute in Mexico and cause substantial expense and loss of time to Plaintiffs, who would be required to litigate the case in Mexico. *See Lauritzen*, 345 U.S. at 589–90, 73 S. Ct. at 932 (finding that the injured seaman was not "disadvantaged in obtaining his remedy under Danish law from being in New York instead of Denmark"). Under Defendants' theory that the Mexican Limitation is substantive law and that it requires that all cases relating to the incident be filed in the same court as the limitation, this factor may be relevant. However, as explained below, the Court finds that the London Convention as ratified by Mexico is procedural. Thus, the Court will not apply the London Convention, and Plaintiffs will not be required, even if Mexican law is applied, to litigate this case in Mexico. Therefore, this factor does not weigh in the analysis.

7. The Law of the Forum

The law of the forum factor is "given little weight in determining choice of law." *Fogleman v. ARAMCO*, 920 F.2d 278, 283 (5th Cir. 1991). Since the case was brought in a U.S. District Court, the slight weight given to it lies in favor of the application of U.S. law. *See id.* ("The Foglemans brought their suit in federal district court. Whatever weight the law-of-the-forum factor has, therefore, tells on the side of the application of United States law.").

8. The Shipowner's Base of Operations

The eighth consideration in the *Lauritzen-Rhoditis* analysis is the shipowner's base of operations. TMM and MarMex are based in Mexico. Plaintiffs claim that discovery is ongoing and that they are still trying to determine the "true nature and extent of Defendants' base of operations." Pls.' Resp. at 9. However, this case was filed in July, 2005, and extensive discovery has already been conducted. Plaintiffs have not offered evidence of ties to the United States that could be considered significant enough to deem TMM or MarMex's base of operations to be in the United States. Thus, this factor weighs in favor of the application of Mexican law.

9. Conclusion Regarding Choice of Law

The Court weighs the factors discussed above, keeping in mind the Supreme Court's admonition that the factors should not be applied mechanically. *See Rhoditis*, 398 U.S. at 308–09, 90 S. Ct. at 1733–34. Even so, the only factor weighing in favor of the application of U.S. law is the law of the forum. The fact that Plaintiffs brought this case in a U.S. District Court and that the Court is therefore more familiar with U.S. law than Mexican law[5] is by no means substantial enough of a consideration to outweigh the factors that favor the application of Mexican substantive law. The allision occurred forty-five miles off the coast of Mexico, in the Bay of Campeche. Both

[5] Furthermore, this Court has, on many occasions, applied Mexican law and is sufficiently adept at the application of foreign law to consider this factor almost irrelevant.

vessels bore the Mexican flag. The defendant shipowner is a Mexican corporation, and its base of operations is in Mexico. The *Lauritzen-Rhoditis* factors overwhelmingly favor the application of Mexican substantive law. Thus, the part of Defendants' Motion and Notice to Apply Mexican Law that requests the application of Mexican substantive law is **GRANTED**.

III. "Transfer" of Venue

TMM and MarMex claim that Mexican law applies to this suit and that Mexican law requires any claims relating to the Mexican Limitation to be "transferred" to the court in which the limitation action is pending. Therefore, according to TMM and MarMex, this Court should transfer this case to the 6th Judicial District in Civil Matters of the First Circuit of Mexico, which the Court construes as a motion to dismiss in favor of litigation in Mexico.

Plaintiffs correctly assert that cases cannot be transferred from one nation to another. Rather, if the defendant in an international case believes the case should be in a foreign court, that defendant should file a motion to dismiss for *forum non conveniens*. In the instant case, Defendants already filed a Motion to Dismiss for *Forum non Conveniens*, and this Court already denied said Motion. To do so again is redundant and unnecessary. Therefore, Defendants' Motion to "Tranfer" is **DENIED**.[6]

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[6] Plaintiffs also claim that transfer is not proper because the Mexican statute of limitations to establish liability, which is two years, has run. Defendants argue that it has not run and that, even if it had, Plaintiffs' failure to file a claim in the court in which the Mexican Limitation proceeding was pending is their

IV. Summary Judgment

A. Legal Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. at 2252 53. If the party moving for summary judgment bears the initial burden of proof, "either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). When the party moving for summary judgment does not bear the initial burden of proof, said party must "inform[] the district court of the basis for its motion, and identify[] those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, 106 S. Ct. at 2253. Then, in either case, the non-moving party must come forward with "specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The court must view all evidence in a light most favorable to the non-movant and "draw all reasonable inferences in favor of the non-moving party." *Chaplin v.*

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own fault. During the Second Motion Hearing, Dr. Melo testified that the Mexican Limitation had been renewed every year since it was filed, so Plaintiffs should still be able to file in Mexico should they desire to do so.

NationsCredit Corp., 307 F.3d 368, 372 (5th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S.242,249–50, 106 S. Ct. 2505, 2511 12, 91 L. Ed. 2d 202 (1986). If the evidence would permit a reasonable fact-finder to find in favor of the non-moving party, summary judgment should not be granted. *Liberty Lobby*, 477 U.S. at 247 48, 106 S. Ct. at 2510. On the other hand, "[i]f the evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted." *Id.* at 249–50, 106 S. Ct. at 2511 (citations omitted).

B. Analysis

Defendants claim that the Limitation of Liability Act is substantive law in Mexico and that it requires all claims regarding the incident for which the limitation was established to be brought in the same Mexican court in which the Limitation was originally filed. Thus, TMM and MarMex request that the Court dismiss this case because it must be heard in the 6th Judicial District in Civil Matters of the First Circuit of Mexico. In the alternative, TMM and MarMex request that the Court stay the proceedings pending the outcome of the Mexican Limitation action and require PMM and the Underwriters to make an appearance therein. If the Court is unwilling to do so, TMM and MarMex request that the Court apply the substantive law of Mexico and limit the liability of the Defendants to the amount of the Mexican Limitation fund.

Conversely, Plaintiffs claim that the Mexican limitation is merely a procedural method of establishing a fund in which claimants receive their proportionate share of the funds. Since U.S. Courts that are applying foreign substantive law still follow

U.S. procedural law, Plaintiffs argue that the Court is not required to observe the allegedly procedural Mexican Limitation. The Supreme Court, in *Black Diamond Steamship Corp. v. Robert Stewart & Sons (The Norwalk Victory)*, addressed this issue. It explained that "if . . . the [foreign] limitation attaches to the right," then U.S. courts should observe the limitation. *The Norwalk Victory*, 336 U.S. 386, 395, 69 S. Ct. 622, 627, 93 L. Ed. 754 (1949). However, if the limitation "merely provides procedural machinery by which claim[s] otherwise created are brought into concourse and scaled down to their proportionate share of a limited fund," then the U.S. court need not observe the foreign limitation because the "forum is not governed by foreign rules of procedure." *Id.* at 396, 69 S. Ct. at 627. The Supreme Court warned, however, that "these apparently clear-cut alternatives are [not] exhaustive" in that "a limit which attaches not to an individual's right of recovery but to the aggregate claims arising from a given tort can be said to be 'attached to the right' only in a special sense of the phrase, and a rule which operates to cut down the amount recoverable by a claimant cannot be fitted within any but a very broad definition of the term 'procedure.'" *Id.* Here, if the 1994 Mexican Navigation Act,[7] which incorporates the London Convention, creates a substantive right, then the Court must honor it. If the Act merely provides a way to quantify rights that parties obtain from other sources, then the Court is not required to observe the Mexican Limitation.

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[7] Both Parties agree that the 1994 Navigation Act, not the 2006 Navigation Act, applies in this instance because the allision occurred before the 2006 Act was enacted.

The Parties' experts eloquently offered their starkly conflicting opinions regarding whether the London Convention as adopted by Mexico in 1994 is procedural or substantive during the Second Hearing. Defendants' expert, Dr. Melo, was involved in drafting the 1994 Mexican Navigation Act and was thus instrumental in Mexico's ratification of the London Convention. Dr. Melo testified that the 1994 Navigation Act only adopts the first eight articles of the London Convention, which he claims are substantive, and that the ninth article, which he claims contains the procedural mechanisms for the enforcement of the substantive rights contained in the first eight articles, was not adopted due to time constraints. Thus, according to Dr. Melo, the 1994 Navigation Act contains no procedural mechanisms and is entirely substantive. He claims that the 1994 Act creates a substantive right to limit one's liability.

Plaintiffs' expert, Dr. Enriquez, who was involved in drafting the 2006 Mexican Navigation Act and is responsible for the regulations arising from the 2006 Act, explained that the 1994 Act details the quantum and the procedure for determining the quantum of a limitation fund, and that it incorporates the London Convention. Dr. Enriquez testified that all Mexican substantive rights arise in the Civil Code, and that, even if Mexico had not adopted the London Convention, the right to recover, which is bestowed in the Civil Code, would still be available. According to Dr. Enriquez, the London Convention merely provides the procedural mechanism for limiting the amount available if a party should exercise its right of recovery

under the Mexican Civil Code.[8] Dr. Enriquez, who has an LLM in English maritime law, also testified that English courts consider the London Convention to be procedural, not substantive.

While the Court found the testimony and experience of both experts to be beyond reproach, and the testimony of both to be highly persuasive, Dr. Enriquez's interpretation is more in line with the distinction noted by the Supreme Court in *The Norwalk Victory*. While Dr. Melo's contention that a right to limit one's liability is created by the London Convention seems intuitively correct, the Court is convinced that such a right fits within the Supreme Court's "broad definition of 'procedure.'" The "right" created by the London Convention creates a right to limit the *remedy*, not a substantive right to recover. *See Oceanic Steam Navigation Co. v. Mellor (The Titanic)*, 233 U.S. 718, 733–34, 34 S. Ct. 754, 756, 58 L. Ed. 1171 (holding that a U.S. limitation may be applied to foreign ships that are sued in the United States when they are not subject to U.S. substantive law and differentiating between limiting the remedy and limiting the right). In Mexico, the Mexican Civil Code creates the substantive right to recover, and the quantum of recovery is determined by the Navigation Act/London Convention. Thus, the Court finds that the London Convention, as incorporated in the Mexican Navigation Act, is procedural. Since U.S. courts apply U.S. procedural law, the instant claim

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[8] Dr. Enriquez consulted with three other admiralty professors, who each agreed that liability limitation in Mexico is procedural. *See, i.e.*, Second Motion Hearing, Plaintiffs' Bench Brief in Support of Application of the U.S. Limitation of Liability Act Exs. I–K.

does not have to be heard in the same court in which the Mexican Limitation is pending. Additionally, even though Mexican substantive law applies to the instant case, if Defendants are found liable under Mexican law, their liability will not be limited by the Mexican Limitation now pending in the 6th Judicial District in Civil Matters of the First Circuit of Mexico. TMM and MarMex's Motion for Summary Judgment is **DENIED**.

V. Conclusion

For the reasons articulated above, TMM and MarMex's Motion and Notice to Apply Mexican Law is **GRANTED IN PART AND DENIED IN PART**. Mexican substantive law applies to this case, but Mexican procedural law does not. The Mexican Navigation Act is procedural. TMM and MarMex's Motion to Transfer Venue to the 6th Judicial District in Civil Matters of the First Circuit of Mexico is **DENIED**. TMM and MarMex's Motion for Summary Judgment and all the requests made therein are **DENIED**.

IT IS SO ORDERED.

DONE this 10th day of May, 2007, at Galveston, Texas.

/s/ Samuel B. Kent
Samuel B. Kent
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 4:05-cv-419
(ADMIRALTY)

[Filed April 29, 2008]

PERFORACIONES MARITIMAS MEXICANAS S.A. de C.V. and CERTAIN REINSURING UNDERWRITERS SUBSCRIBING TO REINSURANCE CONTRACT NO. AHE 030044 AS AMENDED TO NO. AHE-04004,	)
Plaintiffs,	)
v.	)
SEACOR HOLDINGS, INC., GRUPO TMM S.A. de C.V., and MARITIMA MEXICANA S.A. de C.V.,	)
Defendants.	)

MEMORANDUM AND ORDER

Pending before the Court is Defendants' Second Motion for Reconsideration of Order on Defendant's Motion to Dismiss; Or In the Alternative First

Opposed Motion for Reconsideration of Order Denying Defendant's Request for Certification and Motion for Expedited Consideration. Also pending before the Court is Defendant's request, made at an April 25, 2005 hearing, to bifurcate the trial in this case. Defendants' Motion, Docket No. 246, is **DENIED**. Defendant's request to bifurcate is **GRANTED**.

Defendants have not provided new arguments or evidence that justify a second reconsideration of the Predecessor Court's decision not to dismiss this for lack of subject matter jurisdiction or on grounds of forum non conveniens and international comity. Nor will the Court reconsider its decision not to certify this question for interlocutory appeal.

The Court does believe, however, that bifurcation of the bench trial set for May 5, 2008 is convenient, would serve to expedite and economize this case, and is in the interest of justice. *See Lindsey v. Prive Corp.*, 161 F.3d 886 (5th Cir. 1998); FED. R. CIV. P. 42(b)) (the Court may order a separate trial "for convenience, to avoid prejudice, or to expedite and economize."); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2388 ("The major consideration, of course, must be which procedure is more likely to result in a just and expeditious final disposition of the litigation."). The question of bifurcation is "a matter left to the sound discretion of the trial court on the basis of the circumstances of the litigation before it" and a motion to bifurcate "is not subject to any particular time constraint." WRIGHT & MILLER § 2388. Although bifurcation is an exception to the normal rule of trial procedure, this case involves exceptional circumstances that justify dividing the trial into a liability and damages phase. Among other

things, bifurcation will allow the Fifth Circuit to decide with finality any questions regarding the exercise of jurisdiction over Defendants and the Court's interpretation and application of Mexican law in the liability phase before parties and the Court must incur the additional time and cost that will be required to litigate damages.[1]

Defendants' Motion for Reconsideration is therefore **DENIED**, and Defendants' request to bifurcate is **GRANTED**.

IT IS SO ORDERED.

SIGNED this 29th day of April, 2008.

/S/KEITH P. ELLISON
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

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[1] This case requires the Court to interpret and apply Mexican law, and parties dispute issues as basic as the standard of proof that should apply in the case. It appears that some of these questions, including the standard of proof, may have the greatest bearing in the damages phase of the trial. Parties agree that the bulk of this lawsuit will be devoted to damages.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-41021

[Filed February 17, 2010]

PERFORACIONES EXPLORACIÓN Y PRODUCCIÓN, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing to Reinsurance Contract No. AHE-03004 As Amended to No. AHE-04004	)
Plaintiffs-Appellees	)
v.	)
MARÍTIMAS MEXICANAS, S.A. DE C.V., also known as MarMex	)
Defendant-Appellant	)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 05-CV-00419

ON PETITION FOR REHEARING EN BANC

Before BENAVIDES, DENNIS, and ELROD, Circuit Judges.

PER CURIAM:*

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. This denial notwithstanding, we write briefly to address the continued insistence of Appellant Maritimas Mexicanas, S.A. de C.V. ("MarMex") that the district court erred in its determination that it had subject matter jurisdiction over this case and that dismissal was not warranted for forum non conveniens.

First, MarMex contends that the district court should have concluded that federal courts can only exercise subject matter jurisdiction over maritime collisions when there is some clear United States interest in the collision. In support of this proposition, MarMex relies in part on the Supreme Court's decision in *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932). However, in *Canada Malting*, the Supreme Court reviewed its prior decision in *The Belgenland*, 114 U.S. 355 (1885), and explained that,

> The case of *The Belgenland* arose out of a collision on the high seas between foreign vessels of different nationalities; and the objection was raised that the courts of the

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this order should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

> United States were wholly without jurisdiction. Mr. Justice Bradley, speaking for the court, replied that jurisdiction in admiralty did exist over controversies between foreigners arising without the territorial waters of this country, but that the court in such a case would use its discretion in determining whether to exercise it.

285 U.S. at 420. Therefore, when cases concerning maritime collisions only have attenuated links to the United States, the question is not whether subject matter jurisdiction exists, but rather whether courts should abstain from exercising jurisdiction. *See* 2 Thomas J. Schoenbaum, *Admiralty & Mar. Law* § 14-9 (4th ed. 2004) ("In the United States collision jurisdiction potentially extends to the four corners of the globe, to the high seas and even foreign territorial waters. . . . Blatant forum shopping, however, is a cause for concern, and the courts have adopted several ways of abstaining from exercising jurisdiction . . . where justice requires." (footnotes omitted)).

Second, MarMex continues to assert that this case has no links to the United States and that consequently the district court abused its discretion in failing to grant a forum non conveniens dismissal. Although we addressed this argument in our per curiam panel opinion, we write briefly to highlight in greater detail this case's connections to the United States forum. MarMex acquired the ISLA AZTECA only shortly before the allision that produced this litigation. Four months before the allision, a U.S. corporation affiliated with MarMex transferred the vessel to MarMex under a synthetic lease, and MarMex changed the registration of the ISLA AZTECA from an American to a Mexican flag. Since

the allision occurred so shortly after the transfer of the ISLA AZTECA to MarMex, the vessel's crew had several ties to the United States. A U.S. citizen trained the captain of the ISLA AZTECA and was on board the ship only six weeks before the allision. Additionally, when the allision occurred, the ISLA AZTECA's chief mate was employed by a U.S. corporation and has since been assigned to work in Texas. After the allision, third parties operating out of the United States inspected the ISLA AZTECA and repaired the TOTONACA, and consequently many relevant invoices and records are in English. Indeed, before the trial for this case was bifurcated between liability and damages, MarMex's two designated witnesses concerning damages were residents of Texas. Furthermore, in the years since the allision occurred, the ISLA AZTECA has called on U.S. ports for repairs. Finally, MarMex itself has several links to the United States as well. In 2001, MarMex filed an admiralty lawsuit in the United States District Court for the Southern District of Texas, its general manager is a U.S. citizen, and its website currently states that it has "administrative and operational centers" in Texas and Louisiana.[1]

[1] We note that a court cannot conduct an adequate forum non conveniens analysis simply by listing a case's links to the United States and its links to a foreign forum. *See Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1551 (5th Cir. 1991). Instead, a court must engage in a balancing of private and public interest factors, as performed by the district court and reviewed in our original per curiam opinion. The discussion above does not replace the analysis in our original opinion, but merely supplements our description of the facts underlying it.

As we stated in the original per curiam opinion, we reviewed the district court's forum non conveniens decision for abuse of discretion and cannot substitute our own views for the decision of the district court. MarMex has not shouldered its burden to persuade us that the district court abused its discretion.

For the reasons stated above and in our initial per curiam opinion, MarMex's Petition is DENIED.

APPENDIX J

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

No. G-05-CV-419

[Filed July 26, 2006]

PERFORACIONES EXPLORACIO 'n y PRODUCCIO 'n, also known as Protexa; CERTAIN REINSURING UNDERWRITERS, Subscribing to Reinsurance Contract No AHE 030044 As Amended to No AHE 04004	)
-vs-	)
SEACOR HOLDINGS, INC., et al; GRUPO TMM SA; MARITAMAS MEXICANAS SA de CV	)

GALVESTON, TEXAS
July 14, 2006
10:00 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE SAMUEL B. KENT

APPEARANCES:

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[p.3]

THE COURT: Good morning, everyone. Be seated please.

All right. This is a motion proceeding in G-05-419, Perforaciones Exploracio 'n y Produccio 'n y Produccio 'n also known as Protexa versus Seacor Holdings and all them other fellows.

Who's here for the plaintiffs?

MS. ADAMS : Julie Adams.

THE COURT: Well, hello there.

And for the defendants?

MR. STRICKLAND: Your Honor, Tim Strickland, Adrienne Balfour on behalf of Grupo TMM and MarMex.

THE COURT: How are you doing?

MR. STRICKLAND: Good, sir.

MR. BROWN: Jim Brown for Seacor Holdings, Inc., Your Honor.

THE COURT: Hi.

MS. ADAMS: Judge, I also have Carrie Weitinger and Donna Capps with me.

MS. WEITINGER: Hi, Judge. How are you?

THE COURT: How are you doing?

MS. WEITINGER: Fine, thanks.

THE COURT: It sure is nice to see you. How have you been?

MS. WEITINGER: Great.

[p.4]

THE COURT: How is your daddy doing?

MS. WEITINGER: He's doing good.

THE COURT: Tell him I said hi, will you?

MS. WEITINGER: I certainly will.

THE COURT: All right. Thanks.

All right. So as I understand it, you want to amend --

MS. ADAMS: Yes, sir.

THE COURT: -- to cure some procedural problems and simplify our treatment of some pending motions.

MS. ADAMS: Yes.

THE COURT: And you are the picture of outrage.

Tell me your concerns.

MR. STRICKLAND: Your Honor, this is on the plaintiff's motion for leave. PMM, who's going to be the substituted plaintiff in here, has always been the real party of interest and actually was the Mexican entity that filed the Mexican Querella, the criminal action in Mexico. Before this suit was filed, the Querella was dismissed. And it was absolutely no surprise to the plaintiffs in this case who the actual owner of that rig was. They knew about it back in litigation agreement back in -- a few months after the incident, which was March of 2004.

Discovery responses in December 2005 listed PMM as the rig owner and now almost ten months after this suit was

[p.5]

filed they want to be added as a plaintiff. They also want to change the defendant from Seacor Holdings -- and I'll let Mr. Brown express that -- but, frankly, Judge, they've known about that for months also. And Seacor Mexico Marine, Inc. is the actual shareholder that owns a part of MarMex and they've known about that for quite a while also.

The critical issue there, Judge, is -- and I'll let Mr. Brown address that -- but Seacor Marine Mexico Inc. is a Louisiana corporation and has no ties with Texas. And that's our proposition to the motion for leave to amend.

THE COURT: Well, you know all that venue and jurisdictional stuff has been muddied by last summer's hurricane season, which blew Louisiana to Texas.

All right. You got anything to add?

MR. BROWN: No, Your Honor.

THE COURT: What he said.

MR. BROWN: What he said.

THE COURT: And your response.

MS. ADAMS: Your Honor, PMM is, indeed, the correct party of interest and, as Your Honor is -- you more eloquently pronounced the name of the original plaintiff than I was ever able to. We named the --

THE COURT: I took a running start.

MS. ADAMS: We named the wrong party. The PMM has been identified all the way through. PMM sent out the initial

[p 6]

demand immediately after the collision occurred. This is a subrogated case. It's primarily Underwriter's interest. PMM's interest is only to the extent that they paid a deductible in this. There's been no facts that have changed. There's no real parties of interest that are changing. There was nothing nefarious about screwing up and stating the wrong party. It's not like we even hidden them in any way, shape or form.

As to Seacor Mexico we are seeking to add them, not to substitute them. Seacor Holding's story has been, "We have a wholly owned subsidiary" and they hold the 40 percent joint venture share. They can't really produce any documents supporting that and all of their press releases say otherwise, but if they think that their subsidiary is a correct party, then I want both of them in so whichever one shakes out, we have the correct party before the Court.

THE COURT: You leapt to your feet. Was that to say what she said?

MS. WEITINGER: I'm the one who typed the wrong Spanish Mexican name.

THE COURT: Marshal.

THE MARSHAL: Yes, sir.

MS. WEITINGER: I mean, it was not intentional to mislead. So I'm here to -- as my clerical goof up.

THE COURT: Rarely have I heard such an eloquent

[p 7]

apology. We have a criminal sentencing later. You might want to stick around.

MS. WEITINGER: Whatever you say, Judge.

THE COURT: He could help you hone your skills.

Look, we're set for trial in September. Have you-all been taking many and happy trips to Cancun to do discovery or what's going on?

MS. ADAMS: We came back just last night. We took the depositions of all four of the officers yesterday and the day before.

THE COURT: Corporate officers?

MS. ADAMS: No, officers onboard the ISLA AZTECA.

THE COURT: Oh, all right.

How are you harmed by these changes with two months left before trial?

MR. STRICKLAND: Well, we've got a motion to dismiss that's pending.

THE COURT: They're going to be resolved momentarily, sir.

MR. STRICKLAND: And with regards to PEP, the current plaintiff, and PMM, we have a Robins dry dock defense against PEP, which changes the landscape significantly. If this case stays here, Judge, then that changes the way we approach the entire thing.

THE COURT: Requiring what discovery or mechanical

[p.8]

presentation problems?

MR. STRICKLAND: We have not begun discovery with regards to damages at all because of the pending motions to dismiss.

MS. ADAMS: Your Honor, I provided them with a complete copy of the adjuster's file shortly after this case was filed. They've had a box of all the documents with everything. This is simple repairs. The adjuster's located here in the Houston area and there should be no problem.

THE COURT: One of the fallacies -- it's almost like an urban myth with which I have empathetically dealt during the entire 16-and-a-half years I've been on the bench -- is this concept in the minds of many lawyers -- many good lawyers that once a dispositive motion is filed, the file freezes. It, in fact, does not. All the deadlines continue to run and it is incumbent upon respective counsel and their parties to prepare the case for final adjudication in anticipation of an negative

ruling on dispositive relief. I'm not going to grant any extensions on that basis.

I'm going to grant the motion to amend. And prepare your deposition schedules accordingly.

Anything else we need to address for the benefit of the plaintiff today?

MS. ADAMS: No, Your Honor. Thank you.

THE COURT: Or for either defendant?

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MR. STRICKLAND: We have the motions to dismiss, Judge, and that was --

THE COURT: They will be ruled upon, I believe, within the next three or four days.

All right. Thank you very much. Good to see each of you.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: I appreciate your help.

MS. WEITINGER: Judge, may I be excused and not wait for the criminal --

THE COURT: No, you must stay the rest of the day. Yes, of course. It's very good to see each of you.

MS. WEITINGER: Good to see you. Thank you, Judge.

(Court recessed at 10:08 a.m.)

I certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

/s/ Jeanette Byers
JEANETTE BYERS, RPR
July 26, 2006

APPENDIX K

DOCKET ENTRIES

U.S. District Court
SOUTHERN DISTRICT OF TEXAS (Galveston)
CIVIL DOCKET FOR CASE #: 3:05-cv-00419

Perforaciones Exploracio'n y Produccio 'n et al.
v.
Seacor Holdings Inc. et al.

Date	#	Description
		* * *
10/26/2007 (p.1235)	179	NOTICE of Reassignment. Pursuant to General Order No. 2007-10, this case is reassigned to the docket of United States District Judge Keith P Ellison. Deadlines in scheduling orders remain in effect. All court settings are vacated. Judge Samuel B Kent no longer assigned to the case. Parties notified, filed. (jegonzalez,) (Entered: 10/26/2007)
		* * *

APPENDIX L

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL NO. 3:05-419

[Dated May 6, 2008]

PERFORACIONES EXPLORACION Y PRODUCCION, ET AL	)
	)
Versus	)
	)
SEACOR HOLDINGS, INC. and GRUPO TMM SA, ET AL	)
	)

Houston, Texas
9:00 a.m.
May 6, 2008

* * * * *

BENCH TRIAL

BEFORE THE HONORABLE KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

Volume 2 of 2

* * * * *

Proceedings recorded by computer stenography
Produced by computer-aided transcription

Edward L. Reed, CSR
United States Court Reporter
515 Rusk, Suite 8016
Houston, Texas 77002 * 713-250-5594

* * *

[p. 185]

Michael Kneeland - Direct by Ms. Gabbert

A. In 31 March 2004?

Q. Yes, sir.

A. Well, this was a boat that we operated, this was a boat that MarMex owned, a boat that MarMex crewed. We're responsible for all aspects of it. It was a contract we had between MarMex and Pemex. We are responsible for every aspect of this boat, from crewing to groceries, to maintenance to dry docking. So this was one of our vessels.

Q. And did that also include training of the crew members?

A. Yes, it did.

Q. And you said that at the time of the allision, was the ISLA AZTECA under charter with Pemex?

A. It was.

Q. And in the agreement with Pemex, was there a choice of law provision?

A. A choice of law provisions. I believe all the Pemex contracts stimulate Mexico.

MS. FENDLER: Again, I'm objecting to the relevance of this. This all goes to the "*forum non*" issues that have been previously addressed.

THE COURT: I'm going to allow it.

BY MS. GABBERT:

Q. Was there anything from an operational standpoint

* * *

No. 09-1457

In the
Supreme Court of the United States

MARITIMAS MEXICANA, S.A. de C.V., aka MARMEX,
Petitioner,

v.

PERFORACIONES EXPLORACION Y PRODUCCIÓN, aka PROTEXA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) The Fifth Circuit applied the accepted and usual test as required by this Court and the United States Constitution in affirming the district courts' findings of admiralty subject matter jurisdiction under 28 U.S.C. § 1333(1), since this case involves both a maritime *situs* and a connection to a maritime activity. Petitioner's whim to add a third factor requiring factual findings of "discernable interests of the United States or its citizens" is superfluous since both personal jurisdiction and *forum non conveniens* already limit federal admiralty court access to foreign litigants.

2) The Fifth Circuit applied the usual and customary standard of review in affirming the denials of Petitioner's motion to dismiss based on *forum non conveniens* and motions to reconsider the motion to dismiss, since the district court judges did not abuse their discretion in considering the evidence presented, which favored a United States choice of forum. Therefore, supervisory authority should be denied.

PARTIES TO THE CASE AND RULE 29.6 STATEMENT

Respondents here and appellees below are Perforaciones Maritimas Mexicanas, S.A. de C.V. (Protexa Construcciones, S.A. de C.V. and Condux, S.A. de C.V. are the corporate parents) and Certain Reinsuring Underwriters Subscribing to Reinsurance Contract No. AHE-03044 as Amended to AHE-04004:

Navigators Insurance Services of Texas, Inc., which, in 2008 merged into Navigators Management Company, Inc. The surviving entity, Navigators Management Company, Inc., is owned 100% by The Navigators Group, Inc., which is publicly traded on the Nasdaq Global Select Market;

Hannover Re;

Axis Re Ltd, Dublin (Axis Capital Holdings Bermuda is the holding company),

Commonwealth Insurance Company;

Arch Insurance Company, a wholly-owned subsidiary of Arch Insurance Group Inc. (which is an indirect wholly-owned subsidiary of Arch Capital Group Ltd., a public holding company);

New York Marine & General Insurance Company (NY MAGIC INC. is the parent company);

St. Paul Fire and Marine Insurance Company;

ACE INA UK Limited; and

Compagnie de Reassurance d'ile de France

Petitioner here and appellant below is Maritimas Mexicanas, S.A. de C.V. Pursuant to Maritimas Mexicanas, S.A. de C.V's responses to Respondents' interrogatories, the corporate parents of Maritimas Mexicanas, S.A. de C.V. at the time of the allision in question were Seacor Marine Mexico, Inc. and Grupo TMM S.A.

Defendants below are Grupo TMM, S.A., Seacor Holdings, Inc. and Seacor Marine (Mexico), Inc.

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In re Air Crash Disaster Near New Orleans, La.,
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INTRODUCTION

Petitioner is appealing two Fifth Circuit opinions affirming the orders issued by two separate Texas district courts ("District Courts") regarding Marítimas Mexicanas S.A. de C.V.'s ("Petitioner" or "MarMex") motions to dismiss based on lack of subject matter jurisdiction and *forum non conveniens*. The Texas district court orders are: Judge Kent's July 21, 2006 denial of Petitioner's motion to dismiss, Judge Ellison's March 24, 2008 denial of Petitioner's motion to reconsider Judge Kent's order denying the motion to dismiss and Judge Ellison's April 25, 2008 denial of Petitioner's second motion to reconsider Judge Kent's order denying the motion to dismiss.

The reasons provided by Petitioner for seeking this Court's review are Petitioner's disregard for the Fifth Circuit's legal acumen and a generalized, paranoid hysteria that, unless the current law is changed, the United States district courts will be laid to waste by a flood of claims made by foreign entities. Notably, though unrelated to the case at bar, Petitioner's counsel have affirmatively represented to another court in the Southern District of Texas that there is admiralty subject matter jurisdiction over a collision that occurred in the territorial waters of China between foreign flagged vessels, owned by foreign companies.[1] Thus, the argument that there is no admiralty subject matter jurisdiction in this case

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[1] Verified Complaint, Prayer for Process and Relief by Maritime Attachment filed by Timothy Strickland in cause number 3:07-CV-00251, *Koninklijke Boskalis Westminster NV et al v. Mediterranean Shipping Company SA, et al.*

because of a lack of United States contacts is disingenuous and should not be countenanced.

By presenting this Court with arguments that are irrelevant to the test for admiralty subject matter jurisdiction, Petitioner attempts to obfuscate the obvious: a court has admiralty subject matter jurisdiction over an allision occurring on navigable waters. The Fifth Circuit did not break any new ground. Instead, it simply followed the two pronged *Grubart*[2] test for maritime jurisdiction, which has been mandated by this Court for fifteen years, without triggering any of the dire forum shopping consequences imagined by Petitioner. Accordingly, Petitioner has not presented any compelling legal reasons for its Petition for a Writ of Certiorari ("Petition") to be granted.

Specifically, Petitioner has utterly failed to demonstrate how the Fifth Circuit's opinions affirming the District Courts' denials of Petitioner's motion to dismiss and motions to reconsider the motion to dismiss: 1) are in conflict with a decision of any other court; 2) depart from the accepted and usual course of judicial proceedings; or, 3) sanction such a departure by a lower court. *See* Sup. Ct. R. 10. Moreover, the Petition utterly fails to identify an important unresolved question of federal law that needs to be decided by this Court.

There is no case that holds that a link to the United States must be established as a condition for finding

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[2] *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

admiralty jurisdiction, nor should there be. Contrary to Petitioner's argument, such a link is neither necessary nor required, since other defensive procedural mechanisms are already in place, that, if properly asserted, require a court to analyze the links a case has to the United States. A district court is tasked with acting as a gatekeeper when faced with motions to dismiss based on lack of personal jurisdiction, international comity or *forum non conveniens*.

If Petitioner's contacts were so tenuous and devoid of United States interests as to be unfairly hailed into a United States district court, Petitioner should have filed a motion to dismiss based on lack of personal jurisdiction. The district court would have considered the evidence and made the requisite factual findings regarding Petitioner's contacts with the United States. The outcome of such a motion will never be known because Petitioner failed to file such a motion.

Likewise, Petitioner failed to demonstrate to the District Courts how a trial in Mexico would be more convenient than in Texas. Voluminous evidence was presented to the District Courts demonstrating that MarMex was no stranger to the United States or its legal system. As the Fifth Circuit explained in its order denying Rehearing en Banc:

> [s]ince the allision occurred so shortly after the transfer of the ISLA AZTECA to MarMex, the vessel's crew had several ties to the United States. A U.S. citizen trained the captain of the ISLA AZTECA and was onboard the ship only six weeks before the allision and has since been assigned to work in Texas (...) After the allision,

> third parties operating out of the United States inspected the ISLA AZTECA and repaired the TOTONACA, and consequently many relevant invoices and records are in English. Indeed, before the trial for this case was bifurcated between liability and damages, MarMex's two designated witnesses concerning damages were residents of Texas. Furthermore, in the years since the allision occurred, the ISLA AZTECA has called on U.S. ports for repairs. Finally, MarMex itself has several links to the United States as well. In 2001, MarMex filed an admiralty lawsuit in the United States District Court for the Southern District of Texas, and its website currently states that it has 'administrative and operational centers' in Texas and Louisiana.[3]

Following the district court's initial denial of Petitioner's motion to dismiss, Petitioner sought to change the ruling no less than five times by filing an interlocutory appeal, two motions for reconsideration, a post judgment appeal and a Petition for Rehearing En Banc. Respondents, (the owner and insurers of the rig), objected to each challenge, presented the law and the facts and prevailed. Nonetheless, Petitioner continues to complain that the district and appellate courts got it wrong because it is dissatisfied with the results.

In order to achieve a different outcome, Petitioner now seeks to cavalierly overturn years of well-settled law by modifying the test for admiralty jurisdiction to

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[3] Petitioner's Appendix, pp. 122a-123a.

require a link to the United States or alternatively, requiring a *de novo* standard of review for a *forum non conveniens* motion. Thus, on its face, the Petition shows that the Fifth Circuit opinions do not conflict with any other court, or depart from the accepted and usual course of judicial proceedings or sanction such a departure by a lower court. Consequently, no review is warranted by this Court.

STATEMENT OF THE CASE

The Petition conveys the false impression that the Fifth Circuit committed error in upholding a finding of admiralty jurisdiction and in upholding the denial of the motion to dismiss based on *forum non conveniens* in a case with no United States interest whatsoever. Notably, Petitioner omits key factual details about its substantial connections and ties to the United States and also mischaracterizes the nature of the proceedings.

A. Factual Background

On May 31, 2004, the M/V ISLA AZTECA ("AZTECA" or "the vessel") owned by Petitioner hit the Mobile Offshore Drilling Unit, MODU TOTONACA ("TOTONACA" or "the rig") approximately 45 miles off the coast of Mexico.[4] The allision occurred because the improperly trained Chief Mate onboard the AZTECA failed to disengage the vessel from autopilot.[5] As a

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[4] OR USCA5 1212 ¶ 72. All designations of the original record, first supplement of the record and second supplement of the record are designated as "OR" "1S" and "2S."

[5] 1S USCA5 1663, 2340, 5216 and 5822.

result of the allision, the owner of the rig, Perforaciones Marítimas Mexicanas, S.A. de C.V. ("PMM"), incurred more than $5M in damages.[6]

Almost immediately following the allision, Petitioner and its insurers retained Houston, Texas resident Carey Aikin[7] to investigate the accident, report on the damages and adjust Petitioner's claims.[8] Petitioner also retained Houston, Texas counsel, Fowler Rodriguez, within days after the allision.[9] Texas counsel was present when the AZTECA was inspected[10] five days after the incident.

Following the allision, United States residents investigated the vessel's navigation system. Kongsberg, a company based in Louisiana, investigated the AZTECA's control switching.[11] Rolls-Royce, the company that performed an inspection of the AZTECA's aqua pilot controls, is also based in Louisiana.[12]

Repairs to the AZTECA relating to the allision were conducted at Bollinger Shipyard in Louisiana in June

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[6] OR USCA5 1883.

[7] 1S USCA5 1663.

[8] OR USCA5 1398; OR 1899; OR USCA5 2812; 1S 1662; 1S USCA5 2342.

[9] 1S 1662-3.

[10] 1S USCA5 1663.

[11] OR USCA5 1894-96 1S USCA5 1663; 1S USCA5 9695-96.

[12] OR USCA5 1398, OR 1897-903; 1S USCA5 1663.

2006.[13] The Houston, Texas branch of the American Bureau of Shipping ("A.B.S.") inspected the AZTECA following the allision.[14]

The reports relating to Bollinger Shipyard's repairs to the AZTECA are in English.[15] The inspection reports prepared by Mr. Aikin, Kongsberg, Rolls Royce and the A.B.S. are all in English.[16] The manual detailing the dynamic positioning system is in English.[17]

The repairs to the TOTONACA were conducted by Beacon Maritime, a corporation based in Orange, Texas.[18] The engineering expertise for the repairs was provided by Bennett and Associates, a company based in Louisiana.[19] Beacon Maritime's and Bennett and Associates' invoices and reports are all in English.[20]

PMM's lead underwriter, Navigators Insurance Services of Texas, Inc. ("Navigators"), a Plaintiff in the suit, is a Texas corporation with its principal place of

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[13] OR 1879-1903; notably, the repairs were occurring in the United States while MarMex was arguing that the United States was an inconvenient forum. 1S USCA5 51; 1S USCA5 95-96.

[14] 1S USCA5 2645; 1S USCA5 328-32; 1S USCA5 2342.

[15] OR USCA5 54-55; 1S USCA5 2486-2500.

[16] OR USCA5 1894 96; OR 2782; OR USCA5 1897-99; OR 1899-903; 1S USCA5 2465; 1S USCA5 2475-82, and 1S USCA5 322-33.

[17] 1S USCA5 2587-2610.

[18] 1S USCA5 1805-11; 1S USCA5 1663.

[19] OR USCA5 1783; 1S USCA5 1663.

[20] 1S USCA5 1731-45; 1S USCA5 2422-24.

business in Houston, Texas.[21] Navigators' file, containing the proofs of loss and demonstrating payment for the loss, is in English.[22] James Moore, the adjuster and surveyor for the TOTONACA, reviewed all of the invoices related to the allision and prepared reports detailing all of the costs incurred.[23] Mr. Moore resides in Dickenson, Texas and works for J.F. Moore in Houston, Texas.[24] Mr. Moore's invoices and reports are in English.[25]

Seacor Marine Mexico ("Seacor"), a United States company based in Louisiana,[26] owned 40% of MarMex at the time of the allision.[27] As a result of Seacor's ownership interest in MarMex, many relevant facts to this case are rooted in the United States.[28] Just four months before the allision, Seacor transferred the vessel to MarMex under a synthetic lease and MarMex changed the registration of the AZTECA from an American to a Mexican flag. An American captain, who trained in Houston, Texas, trained the captain of the AZTECA[29] and was still on board just six weeks

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[21] OR USCA5 1401, OR 1223, 1483-4.

[22] OR USCA5 57-197.

[23] OR USCA5 1325, OR USCA5 1398, OR USCA5 1783, 1S USCA5 1663.

[24] OR USCA5 183, and USCA5 1223; OR 2089; 1S USCA5 1663.

[25] OR USCA5 1325-33, 1S USCA5 2425.

[26] 1S USCA5 2341.

[27] 1S USCA5 95; OR USCA5 1385-6, OR USCA5 1456; OR USCA5 2905 ¶ 19-24; OR USCA5 1816.

[28] USCA5 1483-84.

[29] OR USCA5 1880

before the allision.[30] The Captain of the AZTECA, who was onboard when the allision occurred, trained in Houston, Texas.[31] Seacor provided the English training manuals onboard the AZTECA.[32] Seacor executives were immediately notified via email of the accident,[33] and Seacor conducted an investigation into the allision and recommended that American captains return onboard.[34] Michael Kneeland, the general manager of MarMex who testified for Petitioner at trial, is a United States citizen and owns a home in Houston, Texas.[35]

At the time Petitioner filed its motion to dismiss, the Chief Mate, who was at the helm of the AZTECA when the allision occurred, was employed by an American company in the State of Louisiana and was assigned to work in Port Arthur, Texas.[36] Mr. Aiken and Mr. Perkin, who Petitioner designated as witnesses regarding damages, reside in Texas.[37]

Petitioner has numerous and significant links to the United States. It has held shareholder meetings in Houston, Texas.[38] Petitioner's own website indicates

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[30] OR USCA5 1893; 1S USCA5 1665; 1S USCA5 2461.

[31] OR USCA5 1880.

[32] OR 1484; OR 1377.

[33] 1S USCA5 2361.

[34] OR USCA5 1793; 1S USCA5 1665.

[35] 1S USCA5 1664.

[36] OR USCA5 51; 1S USCA5 1664.

[37] 1S USCA5 3229-30; 1S USCA5 3292.

[38] OR USCA5 1819; 1S USCA5 1664.

that it has "administrative and operational centers located in (...) the U.S. (Houston, TX and Morgan City, LA)."[39] Petitioner operated vessels with American masters and chief engineers.[40] Petitioner regularly uses dry docks in Texas and Louisiana[41] and has United States bank accounts.[42] In 2001, Petitioner filed an admiralty lawsuit in the Southern District of Texas, Houston Division.[43]

B. Procedural Background

Following the allision, MarMex filed a limitation of liability action in the Sixth District Court of Mexico pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims ("the 1976 Convention").[44] Contrary to Petitioner's pronouncement, the limitation of liability action is not a lawsuit. In fact, Petitioner has previously judicially admitted that the Ex Parte Proceeding did not provide a forum in which the underlying liability of the vessel could be determined.[45] On October 27, 2004, an order was entered allowing MarMex to establish a limitation fund. Pursuant to the order, MarMex posted bond

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[39] 1S USCA5 1662.

[40] OR USCA5 1484; 1S USCA5 1666.

[41] 1S USCA5 1663.

[42] 1S USCA5 1663.

[43] 1S USCA5 1662.

[44] OR USCA5 609-621 (text of limitation); OR USCA5 1416-22; OR 1377-38; 1S USCA5 96.

[45] OR USCA5 1379; OR USCA5 1416; 1S USCA5 96-97.

with the court in the amount of $427,460.97.[46] Respondents have not made a claim on that fund.[47]

On July 28, 2005, Respondents filed suit in the Southern District of Texas against MarMex, Grupo TMM and Seacor Holdings, Inc., the supposed owners and operators of the AZTECA.[48] Petitioner appeared, did not contest personal jurisdiction and denied any liability for the allision.[49] Respondents filed an amended complaint, on July 14, 2006, adding Seacor Marine (Mexico), Inc. as a defendant.

On July 21, 2006, Judge Kent denied Petitioner's motion to dismiss based on *forum non conveniens*, principles of international comity and lack of subject matter jurisdiction.[50] In the same order, Seacor Holdings, Inc. and Seacor Marine (Mexico), Inc. were dismissed from the lawsuit. On May 10, 2007, Judge Kent found that Mexican substantive law would apply to the dispute but that the 1976 Convention would not apply, since it is Mexican procedural law.[51]

This case was subsequently transferred to Judge Ellison's docket in October 2007.[52] MarMex filed a motion to reconsider the order denying its motion to dismiss. Judge Ellison considered and denied the

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[46] OR USCA5 1253; OR 1378 1-79.

[47] OR USCA5 2906 ¶ 3-10.

[48] OR USCA5 15; 1S USCA5 1662 (Grupo TMM).

[49] OR USCA5 207 to 218

[50] OR USCA5 1145.

[51] 1S USCA5 704-719, 2344, 2655 and 2674.

[52] 1S USCA5 1235-6.

motion. Specifically, Judge Ellison held that the predecessor court did not commit a manifest error of law "when determining that subject matter jurisdiction was appropriate based on relevant United States case law."[53] Likewise, when reconsidering the *forum non conveniens* issue, the district court noted "[T]he Predecessor Court's decision on these matters was discretionary, however, and Defendants do not argue that the court applied an incorrect legal standard. Thus, it is difficult for this Court to find that the Predecessor Court clearly committed a manifest error of law. Furthermore, it appears that some of the factors that may have weighed in favor of dismissal eighteen months ago may now tilt the other direction."[54] On April 25, 2008, MarMex filed a second motion to reconsider its motion to dismiss which Judge Ellison denied on April 29, 2008.

That same day, the parties submitted their trial exhibit lists and objections and exchanged all trial exhibits.[55] Respondents' exhibit list included all invoices to support their damage claim related to the repairs.[56] Trial was anticipated to take no longer than three days.[57] Petitioner's counsel represented to the trial court that she envisioned "the bulk of our case is going to be done through cross-examination regarding the damages."[58] On an oral motion during an April 25,

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[53] Petitioner's Appendix, p. 63a.

[54] Petitioner's Appendix, p. 65a.

[55] 1S USCA 53253, 1S USCA5 3322, 1S USCA5 3308.

[56] 1S 3253-86.

[57] 2S USCA5, ll. 23 24.

[58] 2S USCA5 5341, ll. 18-20.

2008 pre-trial conference with the court, Petitioner requested the trial to be bifurcated.[59] Just six days before the May 5, 2008 trial setting, the district court ruled to bifurcate the liability and damage phases of trial.[60] The liability phase of trial was conducted on May 5 and 6, 2008. The damages witnesses designated by Petitioner prior to the bifurcation were: Carey Aiken and Gregg Perkin who are based in Houston and Kingwood, Texas.[61]

On September 2, 2008, Petitioner was found liable to Respondents under Article 1913 of the Mexican Civil Code for causing damage to the TOTONACA, but Grupo TMM was not.

After trial, Petitioner appealed to the Fifth Circuit for review of Judge Kent's denial of its motion to dismiss and the denial of MarMex's motion to apply the 1976 Convention, along with Judge Ellison's denials of Petitioner's motions to reconsider the motion to dismiss. After oral argument, the Fifth Circuit denied Petitioner's appeal on December 9, 2009 and remanded the case for trial on the damages. Petitioner then filed a Petition for Rehearing En Banc which was denied on February 17, 2010.

REASONS FOR DENYING THE PETITION

The Fifth Circuit applied the accepted and usual standard of review and legal analysis for admiralty subject matter jurisdiction and the doctrine of *forum*

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[59] 2S USCA5 5342.

[60] 1S USCA5 1330, 1S 3253 and 1S 3295.

[61] 2S USCA5 3308.

non conveniens. Since the Fifth Circuit's opinions are entirely correct and proper, Petitioner cannot identify any conflict between that decision and the decision of any other appellate courts. Furthermore, Petitioner did not provide any rational legal reasoning to justify departing from years of sound legal precedent except to garner a different outcome. Accordingly, the Petition should be denied.

I. The Fifth Circuit's Decision Finding Admiralty Jurisdiction for an Allision Does not Conflict With the Decisions of this Court or any Other Appellate Courts Because a Vessel Hit a Rig in Navigable Waters

In determining whether admiralty jurisdiction exists, the Fifth Circuit relied on the two pronged test outlined by this Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). The Fifth Circuit affirmed that both conditions of location and connection with a maritime activity were satisfied in this case: the tort involved an allision of a vessel with a rig on navigable waters.

As mandated by this Court, all district courts in all circuits find that the analysis into the existence of admiralty subject matter jurisdiction is dependent only on a maritime *situs* and a connection to maritime activity and not on whether there are discernable interests of the United States involved in the case. In this instance, the allision satisfies conditions of both location and connection with a maritime activity.

The condition of maritime *situs* is met because the allision occurred on navigable waters. It occurred seaward of the territorial sea, approximately 45 miles

off the coast of Mexico.[62] Petitioner has judicially admitted that the allision occurred in an "area of deep sea subject to a legal regime known as "exclusive economic zone."[63] Thus, by Petitioner's own admission, the allision occurred on navigable waters and Petitioner cannot now argue otherwise.

Petitioner never argued to the Fifth Circuit that there was no connection to a maritime activity since the tort involved a vessel alliding with a rig. To the extent that Petitioner now seems to be contesting whether there is a connection to a maritime activity, it is undisputed that allision cases are an important and integral part of maritime law and are clearly encompassed within the concept of maritime activities. Admiralty Jurisdiction: Maritime Nature of Tort-Modern Cases, 80 A.L.R. Fed. 105 § 3(c); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982).

Any analysis into contacts with the United States is clearly not a part of this Court's mandated two pronged test for subject matter jurisdiction. *See e.g. Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co. Ltd.*, 436 F.3d 349 (3d Cir. 2006) (distinguishing admiralty jurisdiction from *forum non conveniens* and personal jurisdiction); *Sosa v. M/V Lago Izabal*, 736 F.2d 1028, 1031 (5th Cir. 1984) (distinguishing admiralty subject matter jurisdiction and choice of law), *Sang Young Kim v. Frank Mohn A/S*, 909 F. Supp. 474 (S.D. Tex. 1995) (distinguishing admiralty subject matter jurisdiction analysis from personal jurisdiction). While no case has addressed the narrow

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[62] OR USCA5 1212 ¶ 72.

[63] OR 1382-1383 (emphasis added).

and specific fact scenario presented by this case (nor would two admiralty cases ever share the same facts given the breadth of potential occurrences that could arise on any given day), this Court has previously found admiralty jurisdiction for torts: 1) between foreigners, 2) occurring in foreign waters; and, 3) relating to purely foreign matters. *See e.g. Langnes v. Green*, 282 U.S. 531, 543 (1931) ("Admiralty courts, for example, have complete jurisdiction over suits of a maritime nature between foreigners"); *Charter Shipping Co. v. Bowring, Jones & Tidy*, 281 U.S. 515, 517 (1930) ("The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court"); *Canada Malting Co. v. Patterson S.S.*, 285 U.S. 413, 418 (1932) ("The libelants concede, as they must, that in a suit in admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse to retain jurisdiction, and that the exercise of its discretion will not be disturbed unless abused"); *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 285 (1897) ("The fact that the cause of action arose in the waters of a foreign port is immaterial ... the law is entirely well settled both in England and in this country that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court.")

In *Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), this Court did not alter the opinion of the panel of the Third Circuit Court of Appeals when it determined that there was admiralty jurisdiction under 28 U.S.C. § 1333(1). Notably, "no significant interests of the United States were involved." *Id.* at 428. "[T]he nub of the controversy was entirely foreign: The dispute centered on the arrest of a foreign ship in foreign

waters pursuant to the order of a foreign court." *Id.* Clearly, admiralty subject matter jurisdiction is not contingent on the outcome of an inquiry into whether interests of the United States are involved.

Appellate courts and legal scholars also agree that admiralty jurisdiction extends to torts occurring in foreign waters, between foreigners and relating to foreign matters. For example, in *The Kanto Maru,* 112 F.2d 564 (9th Cir. 1940), admiralty jurisdiction existed (but was declined) even though the collision occurred in the territorial waters of Japan, no Americans were involved, Japanese law would control the decision and all witnesses were in Japan. More recently, in *Rodriguez v. Transnave Inc.*, 8 F.3d 284 (5th Cir. 1993), neither the parties nor the appellate court ever questioned the existence of general maritime jurisdiction in a suit that involved an Ecuadorian plaintiff, an Ecuadorian defendant and an accident that occurred on an Ecuadorian-flagged vessel in international waters witnessed only by sailors who also resided in Ecuador. *See also e.g. Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981) ("...the admiralty jurisdiction of United States courts is not limited by the nationality of ships, sailors or seas involved"); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 311 (5th Cir. 1987), reh'g denied, 823 F.2d 552, rev'd on other grounds, 486 U.S. 140 (1988) (there was "undoubted admiralty jurisdiction" over claims made by a Singapore plaintiff for an alleged tort that occurred in Singapore waters and governed by the substantive law of Singapore); *Sevison v. Cruise Ship Tours, Inc.*, No. 1996-57, 1997 WL 530267, 6 (D. Virgin Islands Aug. 15, 1997) (stating that the foreign nature of the waters is relevant to the determination of the

appropriate choice of law rather than a determination of whether admiralty jurisdiction exists); Grant Gilmore and Charles Black, Jr., *The Law of Admiralty* § 1-19, at 51-2 (2d Ed. 1975) ("[t]he courts of the United States take jurisdiction, subject to some reservation imposed by their own application of the doctrine of *forum non conveniens*, of suits on maritime claims arising out of transactions and occurrences anywhere in the world" (footnotes omitted)).

Although Petitioner desperately seeks to factually distinguish this case from every case finding admiralty subject matter jurisdiction, Petitioner cannot legitimately dispute that the only facts necessary for a finding of maritime *situs* and maritime activity are present in this case. Petitioner did not contest personal jurisdiction below, presumably because of its numerous discernable connections and interests to the United States, as was borne out in the several hearings that were held on Petitioner's motion to dismiss based on *forum non conveniens* and motions to reconsider the motion to dismiss. Petitioner is now seeking to contort and distort the test for subject matter jurisdiction in an effort to untimely and improperly challenge personal jurisdiction. In view of the current and well established law, this Court should affirm the Fifth Circuit's finding that admiralty jurisdiction exists in this case.

II. The Petition Fails to Establish an Important Question of Federal Law That Should be Resolved by This Court Because Procedural Mechanisms Already Exist That Limit a Foreign Litigant's Access to American Courts For a Claim With no Interests of the United States or its Citizenry

This Court's two pronged *Grubart*[64] test has been on the books for fifteen years and has not caused the untoward "flocking" of foreign entities to American courts. Thus, the crux of Petitioner's plea for the need to review and overhaul the current law has not come to pass. Furthermore, in a case between foreign litigants that truly have no connection to the United States, a court would find it lacks personal jurisdiction over the defendant or decline jurisdiction based on *forum non conveniens* or international comity, if such motions were properly pleaded and factually supported by the foreign party. There is simply no reason for this Court to alter years of sound legal precedent in order to appease one disgruntled litigant.

III. Alternatively, Admiralty Jurisdiction Would Exist Even if Petitioner's "Test" For Admiralty Jurisdiction Required an Analysis into United States Interests

The facts of this case provide a poor vehicle for altering the well established test for admiralty subject matter jurisdiction. Petitioner complains that this allision involves "no discernible interests in the United States." To the contrary, American captains trained

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[64] *Jerome B. Grubart, Inc.*, 513 U.S. at 534.

the crew of the AZTECA and were directed to return to the vessel following the allision. American citizens inspected the navigation system following the allision. An American company provided the engineering expertise necessary to repair the rig. An American company provided an American crew to repair the rig. American citizens inspected the vessel within days after the accident occurred, and American citizens adjusted the claim and were designated as damages witnesses by Petitioner and Respondents. Therefore, even if the current test for admiralty jurisdiction were altered to include an analysis of United States interests, a court would find that in this case, there was sufficient "discernable interests of the United States or its citizens" to justify a finding of the existence of admiralty subject matter jurisdiction.

IV. The Petition Should be Denied Because the Fifth Circuit's *Forum Non Conveniens* Analysis is Consistent With That of Other Appellate Courts

The Fifth Circuit properly applied the settled standards under which all the appellate courts review a district court's ruling on a motion to dismiss for *forum non conveniens*. The Fifth Circuit affirmed that Judge Kent correctly and properly applied the factors set forth in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947) and affirmed that Judge Ellison properly considered new evidence offered in response to Petitioner's motions for reconsideration to determine that the United States is a convenient forum for this dispute.

1. Based on the Evidence Presented, the District Courts Correctly Found that the United States is a Convenient Forum

Based on the overwhelming evidence presented to the District Courts, Petitioner could not establish that the *forum non conveniens* factors favored dismissal of this action. The defendant has the burden of persuasion in proving all elements necessary for the court to dismiss a claim based on *forum non conveniens*. *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43-44 (3d Cir.1988); *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1164 (5th Cir. 1987) (en banc), partially vacated on other grounds, 490 U.S. 1032 (1989). Trial courts have broad discretion in deciding a motion to dismiss based on *forum non conveniens*, and when the district court "has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

a. The Private Factors Favor Maintaining the Action in the Texas District Court

Private interest factors include the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses and all other practical problems that make trial of a case easy, expeditious and inexpensive. *McLennan v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 424 (5th Cir. 2001).

In determining that the private factors did not compel dismissal, Judge Kent was presented with and considered the following:

- Most of the material and relevant documents that were in Spanish had already been translated (Respondents presented the court with an index of all the documents that had already been translated).[65]

- Petitioner was working with counsel who speak and read in Spanish and English.[66]

- Any additional documents could be scanned, emailed, faxed and/or overnight-expressed.[67]

- Petitioner never identified the supposed key Mexican witnesses to be called or the substance of their testimony.[68] Instead, it merely made a general allegation that Mexican witnesses were necessary.[69]

- The majority of witnesses identified in Petitioner's Rule 26 disclosures, thus suggesting they may desire to call them as trial witnesses, were accessible and amenable to the court's

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[65] OR USCA5 1395-96.

[66] OR USCA5 1396; 28 USCA5 5592.

[67] OR USCA5 1396.

[68] OR USCA5 1397.

[69] OR USCA5 1397.

jurisdiction at the time Petitioner filed its motion.[70]

- Key witnesses were amenable to jurisdiction in Texas and most of the witnesses in the case were within the employ of the parties, therefore their attendance at trial could be compelled.

- Respondents and their witnesses were all agreeable to appear in the United States forum.[71]

- Seacor, the 40% interest owner in MarMex at the time of the allision, is a Louisiana corporation.[72]

- Seacor personnel trained MarMex officers, Seacor personnel sailed on MarMex vessels and MarMex personnel were assigned to serve on Seacor vessels.[73]

- The Captain, the Chief Mate, the Chief Engineer and the First Engineer all worked hitches on Seacor vessels (which docked in the United States), while employed by MarMex.[74]

- The distance between the location of the vessels involved in this allision is equally inconvenient

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[70] OR USCA5 1398.

[71] OR USCA5 1398; 1S USCA5 691.

[72] OR USCA5 1398.

[73] OR USCA5 1880 and 2028

[74] OR USCA5 1880

whether this matter were tried in Mexico or Galveston. PMM's headquarters are in Monterrey, Mexico and MarMex's and Grupo TMM's headquarters are in Mexico City. The distance from Campeche, Mexico, where the allision occurred, to Galveston is 706 miles. The distance from Campeche to Mexico City, where MarMex claimed to have a pending limitation, is 563 miles.[75]

- A year and a half had passed from the time of the incident to the date of Petitioner's motion to dismiss based on *forum non conveniens*.[76] Trial of this matter was set for three months after Petitioner filed its motion. There would have been significant delay if the case were dismissed and re-filed in Mexico.

- In their answers to the original complaint, none of the Mexican parties raised the issue of personal jurisdiction.[77]

- Grupo TMM, the other Mexican defendant, was not a stranger to courts of the United States.[78]

Judge Ellison, upon reconsidering Judge Kent's order, was presented with the following additional evidence discovered after MarMex was compelled, on

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[75] OR USCA5 1399.

[76] OR USCA5 1399.

[77] OR USCA5 1390.

[78] OR USCA5 1392.

multiple occasions,[79] to produce documents and corporate representatives for deposition:

- Petitioner has held shareholder meetings in Houston.[80]

- Michael Kneeland, Petitioner's general manager, is a United States citizen and owns a house in Houston.[81]

- Petitioner found the Southern District of Texas a convenient forum when it filed an admiralty lawsuit in 2001 in the Houston division of the Southern District of Texas. Petitioner has also filed lawsuits in New York.[82]

- Petitioner agreed to waive any arguments that the United States was an inconvenient forum in its contracts relating to the sale of the AZTECA.[83]

- Petitioner hired American counsel, Fowler Rodriguez, immediately after the allision, on April 5, 2004, more than one year before Respondents filed this case in the Southern District of Texas. A partner at Fowler

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[79] OR USCA5 1829-45; OR USCA5 2781-85; OR 2807-10; OR 2867; 1S 439-48; 1S 972; 1S 1028; 1S USCA5 1163; 1S USCA5 1233; 1S USCA5 1267; 1S USCA5 1660; 1S USCA5 1878.

[80] 1S USCA5 2360.

[81] 1S USCA5 2360.

[82] 1S USCA5 2359.

[83] 1S USCA5 2359.

Rodriguez's office was present when the AZTECA was inspected on April 5, 2004.[84]

- Petitioner has bank accounts in the United States that it uses to pay its providers.[85]

- Petitioner's own website indicates it has administrative and operational centers in Houston, Texas and Morgan City, Louisiana.[86]

- Carey Aikin, Petitioner's surveyor who inspected the damage to the AZTECA shortly following the allision is based in Houston and became involved in this case a day or two after the allision occurred.[87]

- The AZTECA was sent for repairs related to the allision in the United States, either in Texas or Louisiana.[88]

- Petitioner continues to use drydocks in Louisiana and Texas. Each time Petitioner uses a drydock in Houston, the crew remains in Houston for approximately 30 days. Petitioner flies a supervisor from its offices in Mexico to Houston to supervise the work.[89]

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[84] 1S USCA5 2359.

[85] 1S USCA5 2360.

[86] 1S USCA5 2360.

[87] 1S USCA5 2360.

[88] 1S USCA5 2360.

[89] 1S USCA5 2360.

- Petitioner has since merged with Grupo TMM; Grupo TMM has contracts under which its vessels currently call, on a regular basis, to ports in Houston and Galveston, Texas.[90]

- When the AZTECA's Chief Mate, who was on watch at the time of the allision, was deposed in July, 2006, he was working for a North American Company based in Louisiana and was assigned to work on a vessel stationed in Port Arthur, Texas and was, in fact, leaving for Port Arthur after the deposition.[91]

- Captain Solano, the captain of the AZTECA when the allision occurred, attended a 5 day training course in Houston.[92]

- Luis Ocejo, the corporate representative offered by Petitioner, regularly travels to the United States for business. He is fluent in English and was recently elected to the Board of the A.B.S. in Houston.[93]

- Carlos Lopez, the corporate representative offered by MarMex, is fluent in English. He testified that he has traveled to the United States to attend conferences, meet ship brokers and to attend meetings in shipyards.[94]

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[90] 1S USCA5 2360.

[91] 1S USCA5 2360.

[92] 1S USCA5 2361.

[93] 1S USCA5 2361.

[94] 1S USCA5 2361.

The only private factor that weighed slightly in favor of a Mexican adjudication was the cost of obtaining testimony of both willing and unwilling witness. Respondents, however, volunteered to produce corporate witnesses for depositions in the United States at Respondents' expense.[95]

Petitioner engages in revisionist history to fault the District Courts for failing to consider arguments that it did not timely present. Petitioner's motion to dismiss based on *forum non conveniens* did not argue that seven of the "key witnesses" were no longer employed by PMM. Notably, the first time Petitioner raised such an argument was in its Petition for Rehearing en Banc to the Fifth Circuit and by that time, it was untimely. Significantly, when the district court considered the motion to dismiss based on *forum non conveniens*, many witnesses were still within the employ of PMM and thus available for deposition.[96] Another argument Petitioner currently raises, but did not present to the district court in its motion to dismiss based on *forum non conveniens* is that it never received the returns of the letters rogatory. However, at the time that Judge Kent was considering the motion to dismiss, Petitioner had not filed requests for letters rogatory. Any argument that MarMex is prejudiced by the lack of response to letters rogatory rings hollow given that MarMex waited until three and a half years following the date suit was filed to issue them.

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[95] OR USCA5 1397.

[96] OR USCA5 1398.

Finally, Petitioner improperly attempts to bolster its claim that the United States is an inconvenient forum for the damages portion of the trial by offering yet another new argument and general statement that the damages trial will be based on the testimony of "Mexican residents and Mexican shipyard documents." To the contrary, Petitioner designated Texas residents, Mr. Aiken and Mr. Perkin, as damages witnesses and informed the court that "the bulk of our case is going to be done through cross-examination regarding the damages."[97]

In view of the private factors that were actually presented to the District Courts for their consideration, it was not an abuse of discretion for the District Courts to refuse to dismiss the case based on *forum non conveniens*. Therefore, the Petition should be denied.

b. The Public Factors Favor Maintaining the Action in the Texas District Court

In determining that the public factors do not compel dismissal, the District Courts considered the following:

- At the time MarMex filed its motion to dismiss based on *forum non conveniens*, the case was scheduled for trial in less than three months – dismissal would have resulted in substantial delay.[98]

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[97] 2S USCA5 5341, ll. 18-20.

[98] OR USCA5 1400.

- Respondent's lead underwriter is a Texas citizen, with its principal place of business in Houston, Texas.[99]

- MarMex had indicated its willingness to litigate the issue under a law other than Mexican law by filing a limitation of liability pursuant to the 1976 Convention, which is considered international law in Mexico.[100]

- MarMex did not file its notice to apply Mexican law before filing its motion to dismiss. In the motion to dismiss, Petitioner only generally indicated that Mexican law would apply.[101]

- No jury is required for an admiralty allision case.[102]

- There was a local interest in having localized controversies decided in Texas because Seacor had, at the time of the allision, a 40% ownership in MarMex and conducted regular business in Texas.[103] Seacor exercised significant control over the AZTECA: Seacor executives were notified immediately after the allision occurred;[104] Seacor board members had 50%

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[99] OR USCA5 1401.

[100] OR USCA5 1401.

[101] OR USCA5 1401.

[102] OR USCA5 1402.

[103] OR USCA5 1400.

[104] 1S USCA5 2361.

control in all decisions regarding MarMex;[105] Seacor executives often flew to Mexico to conduct operational discussions with MarMex;[106] MarMex vessels operated with crew employed by Seacor.[107]

- The complaint only alleged causes of action arising under general maritime law of the United States.

Since Petitioner failed to show that a trial would be more convenient in Mexico,[108] the only public factor that weighed in favor of dismissal was that the courts in Mexico would also have an interest in having the controversy decided in their own courts. In view of the public and private factors presented, both district court judges did not abuse their discretion in refusing to dismiss this case based on *forum non conveniens*. No further consideration is necessary or appropriate, and thus review should be denied. *See* S. Ct. R. 10.

Petitioner's argument that the holding of one or two courts justifies a dismissal is unsubstantiated because "each case turns on its facts." *Williams v. Green Bay & Western R. Co.*, 326 U.S. 549, 557 (1946). The cases offered by Petitioner as support for its argument that the District Courts erred contain key differences from this case. In *Canada Malting*,[109] all of the material

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[105] 1S USCA5 2361.

[106] 1S USCA5 2362.

[107] 1S USCA5 2362.

[108] OR 1145, 2024-25.

[109] *Canada Malting Co.*, 285 U.S. 413 at 423.

witnesses were residents of Canada. In this case, key damages witnesses, including Petitioner's, are United States residents. Individuals who inspected the vessels following the allision are United States residents. *Saqui*[110] is also dissimilar in several important aspects: none of the witnesses appeared to reside in the United States and none of the documents had been translated.

2. The Fifth Circuit Properly Found That There Was no Abuse of Discretion

Given the incentives that press the district courts to reduce their caseload, an appellate court "should take particular care before second-guessing a district court that rejects a *forum non conveniens* motion after considering the factors that [it] and the Supreme Court have deemed relevant." *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1225 (3d Cir. 1995) (upholding the district court's refusal to deny a motion to dismiss based on *forum non conveniens* in a suit by Indian nationals against an Indian shipping company and vessel arising from injury to a crew member's child aboard the vessel in international waters.) The Fifth Circuit applied the appropriate standard of review, properly analyzed the District Courts' orders and based on the evidence submitted to the District Courts, found that no abuse of discretion had occurred.

It is of no moment that the Fifth Circuit may not have reached the same conclusion under *de novo* review. The Fifth Circuit's duty, as an appellate court reviewing a district court's *forum non conveniens*

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[110] *Saqui v. Pride Cent. Am., LLC.*, 595 F.3d 206 (5th Cir. 2006).

decision, is to analyze whether the District Courts abused their discretion. "Unlike issues of jurisdiction, determinations of *forum non conveniens* are not pure questions of law; rather they represent exercises of structured discretion by trial judges appraising the practical inconveniences posed to the litigants and to the court should a particular action be litigated in one forum rather than another." *Pain v. United Techs. Corp.*, 637 F.2d 775,781 (D.C. Cir. 1980). Appellate review, therefore, is solely to determine whether there has been an abuse of discretion. *Id.* at 779 (footnotes omitted). *See also, e.g.*, *Gulf Oil Corp.*, 330 U.S. at 508; *Koster v. Lumbermens Mut. Co.*, 330 U.S. 518 (1947).

An abuse of discretion may occur when the district court fails to consider one or more of the important private or public interest factors; does not hold the defendants to their burden of persuasion on all elements of the *forum non conveniens* analysis; or has clearly erred in weighing the factors the court must consider. *Reid-Walen v. Hansen*, 933 F.2d 1390 (8th Cir. 1991) (quoting *Lacey*, 862 F.2d at 43); *See also Fidelity Bank PLC v. N. Fox Shipping N.V.*, 242 Fed.Appx. 84, 91 (4th Cir. 2007). As the Fifth Circuit confirmed, none of these failures occurred in this case.

On appeal to the Fifth Circuit, Petitioner did not contest the adequacy of the procedural framework supporting the District Courts' orders, or point to a single factor that Judge Kent failed to consider in conducting the *forum non conveniens* analysis, nor indicate any issue Judge Ellison failed to consider in declining to reconsider the motion to dismiss. Instead, and as the Petition illustrates, Petitioner simply reiterated its old arguments and created new ones in support of granting the dismissal based on *forum non*

conveniens. The Fifth Circuit considered whether the District Courts failed to weigh all relevant factors and whether its analysis of the facts was reasonable and properly found no abuse of discretion.

Petitioner now argues for the first time that Judge Kent's analysis was defective on its face because the order allegedly contained conclusory statements. This alleged defect was not timely raised before the Fifth Circuit and consequently was not considered. Therefore, this argument has been waived since Petitioner is making this argument for the first time before this Court. Even assuming such an argument were properly made before the Fifth Circuit, Petitioner is incorrect: reading the order in conjunction with the evidence presented by Respondents (and delineated above), it is clear that the statements are not conclusory. In their response to the motion to dismiss, Respondents listed every key document that had been translated, listed the name and employer of every witness amenable to the district court and stated how many miles Petitioner would have to travel if this case were tried in Mexico or Galveston, Texas. Contrary to Petitioner's claim, it is not necessary for an order to cite to the briefs. *See e.g. In re Air Crash Disaster*, 821 F.2d at 1166 fn 32 ("the district court should explain its decision-making process clearly and in sufficient detail to permit us to review it...").

Likewise, the Fifth Circuit properly held, in ruling on MarMex's motions for reconsideration of the motion to dismiss based on *forum non conveniens*, that Judge Ellison properly considered new evidence that was developed after the motion to dismiss was denied, which also warranted maintenance of this action in the United States. *See e.g. O'Keefe v. Noble Drilling Corp.*,

347 Fed.Appx. 27 (5th Cir. 2009) (upholding Judge Harmon's decision to reconsider a motion to dismiss that was previously denied by Judge Kent based on evidence that was either not presented to, not considered by, or otherwise not available to Judge Kent). Indeed, the purpose of a motion for reconsideration is to present the judge with new law or new evidence previously unavailable. Petitioner cannot seriously claim to have been treated unfairly when in response to its motions to reconsider, Respondents presented Judge Ellison with all the evidence it obtained as a result of its motions to compel.

Contrary to Petitioner's assertion, current law does not require a court to determine whether foreign law would apply to a general maritime case prior to analyzing the public/private factors.[11] *See e.g. Piper Aircraft Co.*, 454 U.S. 235 (holding that the possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* analysis); *In re Air Crash Disaster*, 821 F.2d at 1163 (en banc) (expressly rejecting and disapproving of a modified analysis of *forum non conveniens* that requires an analysis into choice of law prior to balancing the private and public

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[11] Some circuits do require a modified *forum non conveniens* analysis that first looks into whether United States law governs the actions but only for Jones Act actions. This case was never filed pursuant to the Jones Act. *See e.g. Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656 (9th Cir. 2009)(noting that the purpose of a choice of law inquiry in a *forum non conveniens* analysis is to determine if the Jones Act, with its special provisions mandating venue in the United States district courts, would apply).

factors); *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983) (pointing out that a choice of law determination is not involved in a *forum non conveniens* analysis). Significantly, Petitioner filed a bare-bones notice asserting that Mexican law should apply one day before the district court issued its decision on the motion to dismiss.[12] Moreover, Petitioner's motion to dismiss contained only a general and conclusory statement that Mexican law "should" apply to the case.

The occurrence and completion of a trial is a factor to be considered and may bolster the decision to deny the motion to dismiss. *See e.g. In re Air Crash Disaster*, 821 F.2d at 1167-8 (en banc) ("Unless the defendant can show that he was greatly prejudiced by the fact that the trial occurred in the particular forum selected by the plaintiff, we believe the trial's occurrence and completion bolsters the district court's original decision to deny the motion to dismiss); *Lony v. E.I. Dupont de Nemours & Co.*, 935 F.2d 604, 614 (3d Cir. 1991). ("[W]henever discovery in a case has proceeded substantially so that the parties already have invested much of the time and resources they will expend before trial, the presumption against dismissal... greatly increases.") As was usual and customary, the Fifth Circuit clearly considered that this case has been ongoing for more than four years. Significantly, liability has already been found against Petitioner. All that remains of this dispute is a determination of the quantum of damages which will not take more than a day and a half to try to the bench.

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[12] OR USCA5 1996; 1S USCA5 90.

3. *De Novo* Review of *Forum Non Conveniens* is Unwarranted

Petitioner seeks to carelessly cast aside a well accepted standard of review for yet another attempt to reverse the lower courts' findings because it is unhappy with the results. There is no spilt in the circuits on this issue, and Petitioner cannot cite a single case that mandates *de novo* review of a motion to dismiss based on *forum non conveniens*. *Piper Aircraft* clearly held, "[t]he *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion." *Piper Aircraft Co*, 454 U.S. at 257. In *Piper Aircraft*, this Court reversed and reinstated the district court's decision because "the Court of Appeals seem[ed] to have lost sight of this rule, and substituted its own judgment for that of the District Court." *Id.* Other circuits have regularly applied this rule of limited appellate review. *See e.g., Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 951 (1st Cir. 1991) (Breyer, C.J.) (district court's determination "may be reversed only where there has been a clear abuse of discretion") (quoting *Piper Aircraft Co.*, 454 U.S. at 254); *Accord SSI Corp. v. Matsuda*, 175 Fed.Appx. 168, 169 (9th Cir. 2006) ("We review the district court's dismissal narrowly for a clear abuse of discretion."); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282 (11th Cir. 2001) ("We review a dismissal based on *forum non conveniens* only for abuse of discretion.").

The current standard of review for *forum non conveniens* has been effectively functioning for over sixty years and should not be disturbed. While a district court has broad discretion in deciding whether

to dismiss an action on grounds of *forum non conveniens*, a court's discretion is not so broad as to preclude meaningful appellate review of its decisions. As explained by the Second Circuit:

> Although the Supreme Court has emphasized the broad discretion of the district courts in deciding whether to dismiss on the basis of *forum non conveniens*, there would be little purpose in Congress giving this Court a power of review if it were not a meaningful one. A meaningful power of review is the right to determine whether the district court reached an erroneous conclusion on either the facts or the law.

Irish Nat'l Ins. Co., Ltd. v. Aer Lingus Teoranta, 739 F.2d 90, 92 (2d Cir. 1984) (citations omitted); *see also Reid-Walen*, 933 F.2d at 1394.

Policy considerations such as judicial economy and balance of power are best served through the implementation of an abuse of discretion standard of review. If a *de novo* review standard were implemented for all *forum non conveniens* motions, litigants who were unhappy with the outcome, such as Petitioner, would engage in perpetual review. As explained by this Court, "[p]erpetual litigation of any issue – jurisdictional or non jurisdictional – delays, and therefore threatens to deny, justice." *Christianson v. Colt Indus. Operating Group*, 486 U.S. 800, 816 (1988) (internal citations and quotations omitted).

Since the case was filed in 2004, Respondents have incurred significant costs in preparing the entire case for trial and in defending against Petitioner's

unnecessary "perpetual litigation" of the *forum non conveniens* issue. The parties have engaged in extensive discovery since Judge Kent's ruling in July 2006 and have already obtained a liability finding against Petitioner. The Court should deny the Petition; otherwise it would result in extreme injustice to Respondents and threaten to further delay the last phase of trial of this matter.

CONCLUSION

Petitioner has failed to show a proper legal basis under Supreme Court Rule 10 for its Petition to be granted. The District Courts' decisions denying Petitioner's motion to dismiss were warranted, correct and proper. Likewise, the Fifth Circuit's opinions are not contradictory to the precedent of this Court or any other appellate courts. Therefore, the Petition for Writ of Certiorari should be denied

Respectfully submitted,

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